(1)

FILED

No. 96 632 AUG 22 1996

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

MICHAEL D. O'NEILL,

Petitioner,

against

THE CITY OF AUBURN, GUY COSENTINO, Mayor of the City of Auburn, JAMES E. MALONE, City Manager for the City of Auburn, JAMES HUTCHINSON, ANN BUNKER, Councilors of the Auburn City Council, ANDREW LALONDE, As Corporation Counsel for the City of Auburn, and OTHER UNKNOWN AND UNNAMED PARTICIPANTS IN THE COMPLAINED OF ACTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. O'NEILL, *pro se*
26.5 Hockeborn Avenue
Auburn, NY 13021
(315) 685-5744

THE REPORTER CO., INC. - Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264
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Questions Presented –

Whether the New York State Court of Appeals Decision and the New York State Appellate Court Decision was the controlling and decisive case as the state court of last resort for City of Auburn City Engineers to receive hearings prior to dismissal as decided in the case of Dunning v. Turner, 285 A.D. 742, 140 N.Y.S. 2d 667 (4th Dep't), aff'd 309 N.Y. 933, 132 N.E. 2d 311 (1955)?

Whether Res Judicata in a 1983 action decided by summary judgment without discovery is proper in a 1983 action where Plaintiff is denied any opportunity for full and fair hearing on any issues in any court and particularly in a due process case when Defendant made a materially false affidavit to the Court and withheld evidence that Plaintiff had a right to a hearing?

Whether the Discovery Practice in the Second Circuit allowing Defendants to withhold material evidence of genuine fact is discriminatory compared to other Circuits in which Defendants would be "duty bound" to deliver such evidence?

Whether a Notice of Removal is appropriate in a 1983 Action in which Plaintiff relies on custom and local practice as the source of rights and Plaintiff starts an action in State Court?

Parties

All of the parties to the proceeding in the United States Court of Appeals for the Second Circuit were the petitioner, The City of Auburn, Guy Cosentino, Mayor, James Malone, City Manager, James Hutchinson and Ann Bunker, City Councilors and Andrew LaLonde, City Corporation Counsel.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Michael D. O'Neill,

Petitioner,

against

The City of Auburn, Guy Cosentino, Mayor, James Malone, City Manager, James Hutchinson and Ann Bunker, City Councilors and Andrew Lalonde, Corporation Counsel,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided May 24, 1996 is annexed hereto as an appendix. Plaintiff O'Neill commenced the original case in January 1993 seeking redress under 42 USC 1983. Discovery was postponed by mutual agreement of the counsel in the 1993 action. Motions were argued in July 27, 1993 and on August 2, 1993 the Court rendered its memorandum decision and order granting defendants summary judgment motion dismissing Plaintiffs complaint. Notice of Appeal was filed August 30, 1993 and the Second Circuit Court subsequently concurred with the District Court. The Second Circuit decision was May 3, 1994, Docket 93-7909, **O'Neill v. City of Auburn, 23 F. 3d 685 (Second Circuit 1994).** The November 21, 1995 Decision of the Northern District of New York which is annexed hereto.

Jurisdiction

(a) This action is maintained according to 42 USC 1983. O'Neill alleges that the defendants deprived him of rights secured by the First, Fifth and Fourteenth Amendment of the United States Constitution.

(b) The decision of the Northern District of New York was entered November 21, 1995.

(c) The decision of the Second Circuit was entered May 24, 1996.

(d) Jurisdiction to review the decision in question by certiorari is conferred by Title 28 USC Section 1254 (1).

Constitution and Statutory Provisions Involved

42 USC section 1983, Dunning v. Turner, 285 A.D. 742, 140 N.Y.S. 2d 667 (4th Dep't), aff'd 309 N.Y. 933, 132 N.E. 2d 311 (1955) (providing local custom), First, fifth and fourteenth Amendments to the Constitution, New York State Civil Service Law, Auburn Civil Service Code.

Statement of the Case

In September 1992, O'Neill was fired by the James Malone, City Manager of the City of Auburn. O'Neill had served 15 consecutive years with the City. James Malone had been City Manager 30 days when he began his process to fire O'Neill based on a series of false accusations by Malone against O'Neill. Malone has subsequently been fired by the City Council. O'Neill was fired 90 days after Malone was appointed City Manager.

Four of the five Defendants are no longer employed by the City of Auburn; Defendant City Manager Malone has been fired, Defendant Mayor Cosentino was not re-elected, Defendant Corporation Counsel LaLonde resigned, and Defendant Hutchinson was not re-elected.

The controlling and decisive case for City of Auburn City Engineers is the case **Dunning v. Turner, 285 A.D. 742, 140 N.Y.S. 2d 667 (4th Dep't), aff'd 309 N.Y. 933, 132 N.E. 2d 311 (1955)** this is uncontroverted evidence that Auburn City Engineers receive hearings and section 75 protection. It is the custom of the City of Auburn to give its City Engineers a Section 75 property right regardless of any other statute, policy, opinion or case law. Two previous City of Auburn City Engineers David Dunning and George Govern each had property rights and received Section 75 hearings in their respective cases, one in the 1950's and the other in the 1970's. The underlying policy, custom and past practice are material facts indicating the City of Auburn gives its City Engineers hearings.

By letter dated September 18, 1991 City Managers Joseph H. Braun and Michael Oropallo stated to Plaintiff O'Neill at the last paragraph of exhibit "E" - **"Please be further advised that pursuant to Section 75 of the Civil Service Law, you have the further right to a hearing in this matter."** This letter was placed by Defendant in Plaintiff's personnel file never mailed to the plaintiff and was intentionally withheld from plaintiff in the "1993 action" and to date, despite plaintiff's repeated requests to obtain a copy of his personnel file plaintiff has not received a response to this discovery request.

Absent a hearing given to other City of Auburn City Engineers O'Neill has no recourse to defend himself. Plaintiff O'Neill is requesting a hearing as he has not received a full and fair

opportunity to be heard in any court on any issue. Plaintiff O'Neill commenced the original case in January 1993 seeking redress under 42 USC 1983. Discovery was postponed by mutual agreement of the counsel in the 1993 action. Motions were argued in July 27, 1993 and on August 2, 1993 the Court rendered its memorandum decision and order granting defendants summary judgment motion dismissing Plaintiffs complaint. Notice of Appeal was filed August 30, 1993 and the Second Circuit Court subsequently concurred with the District Court. The Second Circuit decision was May 3, 1994, Docket 93-7909, **O'Neill v. City of Auburn, 23 F. 3d 685 (Second Circuit 1994).**

Reasons for Granting the Writ

It is the policy, custom and practice of the City of Auburn to give its City Engineers section 75 hearings. City Engineer George Govern received a hearing, City Engineer David Dunning received a hearing and City Engineer O'Neill was told by letter dated September 18, 1991 that he had a right to a section 75 hearing.

Local custom has taken predence granting rights to hearings to Auburn City Engineers.

City Corporation Counsel Earle Thurston stated O'Neill was insulated by Civil Service Protection and "would be entitled to a formal hearing before he could be fired" (appendix "F").

At page 16 of Judge McCurn's August 2, 1993 memorandum-decision-order it is stated **"the only issue before the court is whether or not plaintiff, in his capacity as City Engineer and Superintendent of Public Works, is an independent officer and thus outside the scope of section 75's protection".** The issue should not be that narrowly defined as it is Plaintiff's contention that the custom and practice of the City of Auburn to give its City Engineers section 75 practices extends to O'Neill. Plaintiff may be an independent officer but by custom and practice of a community is still afforded section 75 protection. The controlling and decisive case for City of Auburn City Engineers is the case **Dunning v. Turner, 285 A.D. 742, 140 N.Y.S. 2d 667 (4th Dep't), aff'd 309 N.Y. 933, 132 N.E. 2d 311 (1955)** this is uncontroverted evidence that Auburn City Engineers receive hearings and section 75 protection. It is the custom of the City of Auburn to give its City Engineers a Section 75 property right regardless of any other statute, policy, opinion or case law. Two previous City of Auburn City

Engineers David Dunning and George Govern each had property rights and received Section 75 hearings in their respective cases, one in the 1950's and the other in the 1970's. The underlying policy, custom and past practice are material facts indicating the City of Auburn gives its City Engineers hearings.

By letter dated September 18, 1991 City Managers Joseph H. Braun and Michael Oropallo stated to Plaintiff O'Neill at the last paragraph of exhibit "E" - **"Please be further advised that pursuant to Section 75 of the Civil Service Law, you have the further right to a hearing in this matter."** This letter was placed by Defendant in Plaintiff's personnel file never mailed to the plaintiff and was intentionally withheld from plaintiff in the "1993 action" and to date, despite plaintiff's repeated requests to obtain a copy of his personnel file plaintiff has not received a response to this discovery request. Defendant Malone stated he gave O'Neill's previous counsel this information. This is false.

To date Plaintiff's requests for a copy of his personnel file have been never been supplied or answered by Defendant.

Plaintiff claims herein that local law and custom provide property interests to plaintiff and that Plaintiff has a property right and is entitled to a hearing.

The Court in its decision of May 3, 1994, Docket 93-7909 **O'Neill v. City of Auburn** stated at page 8 "Our task is to predict how the state's highest court would rule on this issue" and quoted **Brooklyn navy yard asbestos litig. (Joint E. & S. Dist. Asbestos Litig, 971 F2d 831, 850 (2d Cir 1992)** "A federal court faced with a question of unsettled state law must do its best to guess how the state court of last resort would decide the issue". Plaintiff submits that **Dunning v. Turner, 285, Ad 742, 140 NYS 2d 667 (4th Dep't), aff'd, 309 NY 933,**

132 NE 2d 311 (1955) is the law for City of Auburn City Engineers in New York State. If that is not the law then Plaintiff should be entitled to proceed in State Court and the case should not be removed to Federal Court.

Defendant Counsel in practice in other District Courts would be "duty bound" to deliver the September 18, 1991 letter to Plaintiff and the Courts. In the interest of judicial economy Defendant should have released the letter.

Dismissal on summary judgment is not appropriate when Discovery has not been held when the parties to the lawsuit agreed to hold Discovery after the original summary judgment motions were decided by the District Court to limit the areas of Discovery in the interest of judicial economy. Judge McCurn at page 17 line 16 of his decision incorrectly quotes Defendant Counsel D'Ambrosio's Affidavit. There was mutual agreement to delay Discovery requests as stated by D'Ambrosio at appendix "I" Defendant Counsel stated at page 5 paragraph 14 & 15 "counsel for all parties agreed that defendants original motion for partial judgment on the pleadings might help clarify the scope of the action and determine the issues on which discovery would be necessary." At appendix "I" paragraph 15 Defendant Counsel states "in light of defendants' outstanding discovery requests, the plaintiff should not be entitled to summary judgment on the first claim. Discovery could assist the defendants in establishing their independent officer defense".

The doctrine of Res Judicata is not a defense when the Defendants counsel and Plaintiffs previous counsel mutually agreed to postpone Discovery until after the 1993 summary judgment motions in consideration of efficient judicial administration and of repose which subsequently precluded and fore-

closed Plaintiff from having actual opportunity to be heard in any court on any issue.

Parties must be given ample opportunity to conduct discovery on "state action" issue before summary judgement is proper in 42 USC 1983 action. Hoover v. Holston Valley Community Hospital (1981, ED Tenn) 545 F Supp 8.

Plaintiff claims herein that local law and custom provide property interests to plaintiff and they should be heard. Plaintiff commenced this second action in September 1995 when Plaintiff was given a copy of the September 18, 1991 letter indicating Plaintiff had a right to a section 75 hearing and plaintiff subsequently reviewed the material false statements from Defendant Malone's affidavit. Plaintiff seeks reinstatement to his position with monetary relief (back pay, compensatory and punitive damages). Plaintiff O'Neill is requesting a hearing as he has not received a full and fair opportunity to be heard in any court on any issue.

It is the policy, custom and practice of the City of Auburn to give its City Engineers section 75 hearings. City Engineer George Govern received a hearing, City Engineer David Dunning received a hearing and City Engineer O'Neill was told by letter dated September 18, 1991 that he had a right to a section 75 hearing. Local custom has taken predence granting rights to hearings to Auburn City Engineers.

The Federal Court has never heard nor reached the merits of this case or any previous case. Res judicata is never a defense in a 1983 action when the court proceedings did not reach the merits, DeLuca V. Sullivan (1977, DC Mass) 450 F Supp 736. The Court of Appeals for the Second Circuit stated res judicata should not be applied to procedual due process questions in

1983 actions, particularly where the effect would be to deny plaintiffs any hearing on the issues in any court, Lombard v. Board of Education (1974, CA2 NY) 502 F2d 631 cert den 420 US 976, 43 L Ed 2d 656, 95 S Ct 1400 and on remand (ED NY) 400 F Supp 1361 and on remand (ED NY) 406 F Supp 1166 and on remand (ED NY) 440 F Supp 577.

The policies of efficient judicial administration and of repose embodied in the doctrine of res judicata must not be permitted to preclude or foreclose a party from having an actual opportunity to be heard, Neeld V National Hockey League (1977 WD NY) 439 F Supp 446, 450.

By letter dated September 18, 1991 City Managers Joseph H. Braun and Michael Oropallo stated to Plaintiff O'Neill at the last paragraph of exhibit "E" to Plaintiffs Response and Objection to NDNY Rule 7.1 (f) - **"Please be further advised that pursuant to Section 75 of the Civil Service Law, you have the further right to a hearing in this matter."** This letter was in Plaintiff's personnel file and was intentionally withheld from plaintiff despite plaintiff's repeated requests to obtain a copy of his personnel file. To date Plaintiff's request has been never been answered by Defendant. This is an issue to be resolved by the State Court. These are genuine issues of fact and they have never been heard in Federal or State Court. Res judicata is never a bar to a 1983 action which is based even in part upon facts that were not in existence at the time of earlier litigation in either federal or state courts, Black Voters v McDonough (1976, DC Mass) 421 F Supp 165, aff'd (CA1 Mass) 565 F2d 1.

Reasonable doubt as to what was decided by a prior judgment should not be resolved against a party making it a bar to a 1983 action, prior state court proceedings concerning the same general subject matter cannot by themselves require dismissal of a 1983

action, Mulligan v. Schlachter (1968, CA6 Mich) 389 F2d 231, Burchett v. Bower (1973, DC Ariz) 355 F Supp 1278. There is no res judicata where constitutional issues were either not explicitly raised or not fully litigated in the state proceedings, North Shore Right to Life Committee v. Manhasset American Legion Post No. 304 (1978 ED NY) 452 F Supp 834, 837.

Res judicata is never a defense in a 1983 action when previous state court proceedings did not reach the merits, Wade v. Pittsburgh (1085, CA3 Pa) 765 F2d 405, The doctrine of res judicata does not apply to bar a 1983 action where the plaintiff did not receive a legitimate opportunity to litigate his claim in a prior state court proceeding, Adams v. Sewell (1991, CA11 Fla) 946 F2d 757, 57 BNA FEP Cas 433, 57 CCH EPD 41084, 34 Fed Rules Evid Serv 390.

The Supreme Court ruled that state court judgements will be given binding effect when the state court, acting within its proper jurisdiction, be it civil or criminal, has given the parties a full and fair opportunity to litigate federal claims, Allen v. McCurry (1980, US) 66 L Ed 2d 308, 101 S Ct 411. State court summary judgment based on immunity granted by state tort claims statute is not resolution on merits and consequently has no preclusive effect on federal civil rights claim arising out of same occurence, Ligas v. Allen (1985, CA3 Pa) 765 F2d 53.

A property interest in a particular position arises only when an individual possesses a "legitimate claim of entitlement" to continued job tenure. Such entitlement is not created by Constitution, but by independent sources such as state law and local custom. Tranello v. Frey, 758 S. Supp. 841, 852 (WDNY 1991), aff'd, 962 F.2d 244 (2d Cir. 1992); Board of Regents v. Roth 408 US 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed. 2d 548 (1972). If a plaintiff possesses such a legitimate claim of

entitlement to his position, the State may not deprive him of that position without due process. Cleveland Bd. of Educ. v. Loudermill, 470 US 532, 538 105 S. Ct. 1487, 1491, 84 L.Ed. 2d 494 (1985). Plaintiff claims herein that local law and custom provide property interests to plaintiff and they should be heard.

Property interests in continued public employment are not created by the Constitution; rather, they are created, and their parameters are defined by independent sources such as custom and state law. Cleveland Board of Education v. Loudermill, 470 US 4532, 4538, 105 S. Ct. 1487, 1491 (1985), Board of Regents v. Roth, 408 US 564, 577, 92 S. Ct. 2701, 2709 (1972). It is well settled that when a governmental employee has tenure or a contract right to continued employment, that constitutes "property" that is protected by the Fourteenth Amendment's due process clause. Dwyer v. Regan, 777 F. 2d 825, 829 (2d Cir. 1985), Petrella v. Seigel, 843, F. 2d 87, 89 (2d Cir 1988), Ostrowski v. City of New York, 601 F. 2d 629 (2d Cir. 1979) modified 793 F 2d 457 (2d Cir 1986), Berns v. Civil Service Commission, 537 F 2d 714, (2d Cir 1976), cert denied 430 US 930, 97 S. Ct. 1549 (1977), Anderson v. Dolce 653 F. Supp 1556, 1565, (SDNY 1987).

The source of Mr. O'Neill's property interest is custom of the City of Auburn, past practice of the City of Auburn, public statements by two Corporation Counsellors, Two City Councilors, the former Mayor of the City of Auburn, and section 75 of the Civil Service Law of New York State all indicate O'Neill had a right to a hearing. Custom and section 75 have been recognized by both federal and state courts in creating property interests in continued employment with due process attaching.

This right must come from either state law or, in its absence, mutual understanding of the parties, Board of Regents v. Roth, 408 US 564, 577 (1972).

Where a City Charter vests the City Manager with the absolute, discretionary authority to hire and fire unclassified personnel, the manager's termination of an employee for retaliatory reasons subjects the municipality to 1983 liability, Martinez v. City of Opa Locka, Florida (1992, CA11, Fla), 971 F2d 708, 23 FR SERv 3d 856, 6 FLW Fed C 1110.

Substantive due process claims may be established in either of two ways. A 1983 plaintiff need not prove a violation of a specific liberty or property interest, but must show that the defendant's conduct "shocks the conscience". Alternatively, a plaintiff may demonstrate a violation of an identified liberty or property interest portected by the due process clause. Pittsley v. Warish (1991, Ca1, Mass) 927 F2d 3, 32 Fed Rules Evid Serv 544, cer den (US) 116 L Ed 2d, 183, 112 S Ct 226.

Res judicata does not apply to bar a 1983 action where the plaintiff did not receive a legitimate opportunity to litigate his claim in a prior petition for writ of mandamus action heard in state court. Adams v. Sewell (1991 CA11, Fla) 946 F2d 757, 57 BNA PEP Cas 433, 57 CCH EPD, 34 Fed Rules Evid Serv 390. School Board acted in bad faith in abolishing position of school plant superintendant and transferring duties of such position entitled administrative assistant for school plant where such acts were taken without the approval of the civil service commission and new position was filled by former subordinate of holder of school plant superintendent position. Seligman v. Half Hollow Hills Schools (1972) 74 Misc 2d 246, 341 NYS2d 935.

In 42 USC 1983 suit based on illegal discharges, wrong done by employer consists not of discharging employee but of discharging him for illegal reasons and it is irrelevant to consideration of remedy for that wrong that it might have been avoided by dsicharge for legal reason. Beazer v. New York City Transit Authority (1977 CA2 NY) 558 F2d 97, 17 BNA FEP Cas 226, 14 CCH EPD f440 US 568, 59 L Ed 2d 587, 99 S Ct 1355, 19 BNa FEP Cas 149, 19 CCH EPD.

Action of members of school board, in voting to terminate principal's employment for violation of anti moonlighting covenant in employment contract, was in violation of his equal protection rights where rule had not been applied to other teachers who had moonlighted. Gosney v. Sonora Independent School Dist (1979, CA5 Tex) 603 F2d 522.

Custom is the action of a municipal corporation when the custom executes or implements official policy of the local government. The policy can be found in an ordinance, regulation, policy statement or decision officially adopted by the municipality's officers, or in a pattern of persistent practices sufficiently known to and approved by the municipal officers to constitute a custom of equivalent though unofficial authoritativeness. Muzquiz v. San Antonio (1978, CA5, Tex) 586 F 2d 529, Smith V. Ambrogio (1978, DC Conn) 456 F Supp 1130, 1134.

Summary judgment is inappropriate in action challenging propriety of discharge of employee of city's register of wills for political and patronage reasons prior to full factual exposition of duty and responsibilities of such employees which is necessary for determining whether particular employee was in policy formulating position. Retail Clerks International Asso. v. Leonard (1978, Ed Pa) 450 F Supp 663.

Municipal liability is established in 42 USC 1983 action by former probationary police officer who established that he was discharged for engaging in constitutionally protected activity, where plaintiff was fired by City Manager who is vested with ultimate responsibility for hiring, firing and management of city employees. McKinley v. Elroy f(1983, CA9, Ariz) 705 F2d 1110.

Property interest under 42 USC 1983 can be created by specific statutory or contractural entitlement, by implied contract or by common law of particular industry or plant. Hernandez Del Valle v. Santa Aponte (1977, DC Puerto Rico) 440 F Supp 254, 575 F2d 321, Colon Velez v. Santiago Del Hernandez (1977, DC Puerto Rico) 440 F Supp 432.

The retaliatory discharge of a public employee violative of the petition clause of the First Amendment is redressable in an action under 1983. Belk v. Minoequa (1988, CA7 Wis) 858 F2d 1258, 3 BNA IER Cas 1489.

The Supreme Court has held that the First Amendment prohibits goverment officials from discharging or threatening to discharge, public employees because of their political affiliation, unless such affiliation is an appropriate requirement for their position. Elrod v. Burns (1976) 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673, 1 BNA ier Cas 60, Branti v. Finkel (1980) 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287, 1 BNA Ier Cas 91. While there is no constitutional right to public employment as such, public employees have constitutional rights to be free from arbitrary discharge and unreasonable discriminatory practices. Vega Matta v. Alvarez De Choudens (1977, DC Puerto Rico) 440 F Supp 246, 25 FR Serv 2d 503, aff'df without op (CA1 Puerto Rico (577 F2d 772. The retaliatory discharge of a public employee violative of the petition clause of the First Amend-

ment is redressable in an action under 1983. Belk v. Minocqua (1988, Ca7 Wis) 858 F2d 1258, 3 BNA IER Cas 1489.

Defendant at an April 3, 1992 meeting told O'Neill to stop publishing his newspaper **THE RECORD** because of its political position and that it competed with Defendant Mayor Cosentino's employer, a rival newspaper. O'Neill stopped publishing that week.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court reverse in all particulars the decision and order rendered by the United States District Court for the Northern District of New York and the United States Court of Appeals Second Circuit and the judgment entered on the basis of those decisions and orders be reversed, and that this writ of certiorari be granted.

Dated: October 7, 1996

Respectfully submitted,

MICHAEL D. O'NEILL
Petitioner
26.5 Hockeborn Avenue
Auburn, NY 13021
315-685-5744

TO:
Bond Schoeneck and King
Attorneys for Respondents
NICHOLAS J. D'AMBROSIO, JR.
111 Washington Street
Albany, New York 12210-2280
518-462-7421

APPENDIX A—Second Circuit May 24, 1996 Order

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Twenty-Fourth day of May, one thousand nine hundred and ninety-six.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE RALPH K. WINTER,
HONORABLE GUIDO CALABRESI,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
MAY 24 1996
GEORGE LANGE III, CLERK
SECOND CIRCUIT

MICHAEL D. O'NEILL,

Plaintiff-Appellant,

-v.- No. 96-7007

THE CITY OF AUBURN, GUY COSENTINO, Mayor of the City of Auburn, JAMES E. MALONE, City Manager for the City of Auburn, JAMES HUTCHINSON, Councilor of the City of Auburn, ANN BUNKER, Councilor of the City of Auburn, ANDREW V. LALONDE, As Corporation Counsel for the City of Auburn, OTHER UNKNOWN, Other unknown and unnamed participants in the complained of acts,

Defendants-Appellees.

Appearing for Appellant: Michael D. O'Neill pro se, Auburn, N.Y.

Appearing for Appellees: Nicholas J. D'Ambrosio, Jr., Bond, Schoeneck & King, Albany, N.Y.

O'Neill v. City of Auburn, No. 96-7007

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by plaintiff pro se and by counsel for defendants.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District

Court be and it hereby is affirmed substantially for the reasons stated by Judge McCurn on the record on November 21, 1995.

s/Amalya L. Kearse
AMALYA L. KEARSE, U.S.C.J.

s/Ralph K. Winter,
RALPH K. WINTER, U.S.C.J.

s/Guido Calabresi
GUIDO CALABRESI, U.S.C.J.

APPENDIX B—Northern District Order
November 21, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

MICHAEL O'NEILL,

Plaintiff,

vs. 95-CV-1492

CITY OF AUBURN, et al,

Defendants.

PROCEEDINGS held on November 21, 1995, at the United States Courthouse, Syracuse, New York before HONORABLE NEAL P. McCURN, Senior United States District Court Judge, Northern District of New York.

APPEARANCES

FOR THE PLAINTIFF:
MICHAEL O'NEILL, Pro Se

FOR THE DEFENDANTS:
Bond, Schoeneck & King
BY: NICHOLAS J. D'AMBROSIO, ESQ., of Counsel.

KENNETH H. CREWELL, JR.
Official United States Court Reporter
100 South Clinton Street, Room 231
Syracuse, New York 13260
(315) 423-5530

(2) (Whereupon, the following occurred in open court.)

THE COURT: The Court has reviewed the papers before it in connection with the motions today. I have listened to the argument of counsel for the City of Auburn and also Mr. O'Neill, pro se, and have taken that argument, both arguments into consideration. The following constitutes the court's decision on these motions.

Presently before the court are motions made on behalf of the defendants as well as plaintiff. The defendants move for summary judgment on the grounds that the present action is barred by the doctrine of res judicata and the applicable statutes -- statute of limitations. Plaintiff opposes this motion in its entirety. In addition, he moves for partial summary judgment with respect to the issue of defendants' liability for the acts alleged in the first and seventh causes of action. Finally, plaintiff moves to remand this action to state court on the grounds that its removal was procedurally defective.

BACKGROUND.

Plaintiff Michael D. O'Neill, represented by counsel, commen (3) action pursuant to 42 U.S.C. Section 1983 against these same defendants in this court on January 21, 1993 ("1993 action"). In that action, plaintiff's complaint contained two separate causes of action. The first alleged that by terminating his employment as City Engineer/Superintendent of Public Works without a pretermination hearing defendants had deprived him of his property interest in his job without due process of law in violation of the Fifth and Fourteenth Amendment to the United States Constitution. The second alleged that by publicly disclosing fallacious reasons for the termination of his employment, defendants had deprived him of his liberty interest and his reputation in violation of Fifth and Fourteenth Amendment to the United States Constitution.

The parties cross-moved for summary judgment. The court entertained oral argument on those motions on July 27, 1993, and reserved decision. In a Memorandum-Decision and Order filed August 2, 1993, the court granted defendants' motion for summary judgment with reference to both causes of action and instructed the clerk of the court to enter judgment in favor of defendant and against plaintiff.
O'Neill v. City of Auburn, No. 93-CV-100, 1993 U.S. Dist. LEXIS 10958 (N.D.N.Y.Aug. 2, 1993). Mr. O'Neill (4) appealed this decision to the appellate court. In an opinion filed May 3, 1994, the Second Circuit affirmed this court's decision in its entirety.
O'Neill against City of Auburn, 23 F. 3d 685 (Second Circuit 1994).

On September 15, 1995, Mr. O'Neill, proceeding pro se, commenced the present suit in New York State Supreme Court for the County of Cayuga. On October 4, 1995, defendants filed a notice of removal on the grounds that plaintiff's claims "(a)rise under the laws of the United States and may be removed to this court without regard to the citizenship of the parties or amount in controversy". See defendants' notice of removal at paragraph 7. On October 12, 1995, defendants filed the present motion for summary judgment. In addition to opposing this motion, plaintiff cross-moved for partial summary judgment on the issues of defendants' liability for the acts alleged in his first and seventh causes of action. Finally, plaintiff moved to remand this action to state court.

DISCUSSION.

(1) Removal. Even a cursory reading of plaintiffs complaint demonstrates that his action is (5) based upon the claims arising under the United States Constitution. The first sentence of his complaint provides that "this action arises under the provisions

of the Civil Rights Act of 1871, as amended, 42 U.S.C., 1981 et seq." See Plaintiff's Complaint at paragraph 1. He goes on to explain that he "seeks declaratory relief, injunctive relief and compensatory and punitive damages to redress the deprivation of his rights from discriminatory employment practices by defendants and to redress the deprivation of a right, privilege and immunity secured to the plaintiff by the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C., section 1983, U.S.C., section 1985, by custom of the City of Auburn, and under the Auburn Civil Service Rules and Regulations." See id. (emphasis added.)

As this language makes clear, plaintiff seeks redress for alleged violations of his constitutional rights. In common legal parlance, his complaint can be characterized as a Section 1983 action over which this Court, unquestionably, has original jurisdiction.

Moreover, the fact that state courts possess concurrent jurisdiction over Section 1983 actions, does not render defendants' removal defective. (6) As one court recently stated "the general rule is that 'absent an expressed provision to the contrary, the removal right should be respected when there is concurrent jurisdiction.' " Yurick v. Sheet Metal Workers' International Association, 889 F. Supp. 706 (Southern District of New York 1995) (quoting Wright Miller and Cooper, Federal Practice and Procedure Section 3739 (1985 and Supp. 1990)) (Citing Chilton v. Savannah Foods & Industries, 814 F.2d 620 (11th Circuit 1987); Mercy Hospital Association v. Miccio, 604 F.Supp. 1177 (Eastern District New York 1985)).

Finally, despite plaintiff's assertion to the contrary, removal of this action does not deny him access to a judicial forum. Although this Court may not be plaintiff's forum of choice, it does have original jurisdiction over his claims and, thus, provides him with a proper forum for adjudication of the same.

After carefully reviewing all of plaintiff's arguments in support of remand, the court concluded that none of them is sufficient to defeat defendants' right to remove the present action to this court. Accordingly, the court denies plaintiff's motion to remand this action to state court."

(2) RES JUDICATA.

(7) "A judgment upon the merits in one suit is res judicata in another where the parties and subject matter are the same, not only as respects matters actually present to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end". Lawrence v. Secretary, Department of Treasury, No. 89-CV-740, 1993 U.S. District LEXIS 15111, *5 (Northern District of New York October 7, 1993) (quoting Woods v. Dunlop Tire Corp, 972 F.2d 36, 38, (Second Circuit 1992, cert. denied, ___U.S.___, 113 S.Ct. 977, 122 L.Ed.2d 13 (1993) (quoting in turn Grubb v. Public Utils. Comm'n of Ohio, 281 U.S. 470, 479, 50 S.Ct. 374, 74 L.Ed. 972 (1930) (other citations omitted))).

Thus, " ' res judicata "prevents a party from litigating any issue or defense that could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided." ' " Id., 1993 U.S. District LEXIS 15111, AT *5-*6 (quoting Woods, 972 F.2d at 38 (quoting in turn Clarke v. Frank, 960 F.2d 1146, 1150 (Second Circuit 1992). (Other citations omitted))).

(8) "In making its decision about the preclusive effect of a previous judgment, the court should consider ' "wether (sic) the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." ' " Id ., 1993 U.S. District LEXIS 15111, AT *6 (quoting Woods, 972 F.2d at 38 (quoting in turn NLRB v. United

Technologies, 706 F.2d 1254, 1260 (Second Circuit 1983))). Moreover, "it does not matter if the plaintiff's legal theory in the second action is different from that espoused in the first. Rather, 'it is thee (sic) identity of facts surrounding the occurrence which constitutes the cause of action, not the legal theory upon which plaintiff chooses to frame his complaint.' " Id., 1993 U.S. District LEXIS 15111 as *6 (quoting Woods, 972 F.2d at 39 citing in turn Berlitz Sch. of Languages of Am., Inc. v. Everest House, (Second Circuit 1980)) (other citation omitted)).

Applying these principles to the facts of this case, the court is left with the inescapable conclusion that the doctrine of res judicata bars plaintiff from litigating the claims contained in his complaint. There is no dispute that the parties in the (9) 1983 action and the present action are identical. Nor does plaintiff argue that the subject matter of the two actions is different. Rather, the basis for his opposition to the application of res judicata to this action is his assertion that the court never issued a final judgment on the merits with respect to the issues raised by his complaint.

As the court has already noted, both this action and the 1993 action are based upon defendants' allegedly unlawful termination of plaintiff's employment as City Engineer/Superintendent of Public Works. In his complain in the 1993 action, plaintiff asserted two causes of action, one based upon alleged violation of a constitutionally protected property interest and the other based upon an alleged violation of a constitutionally protected liberty interest. In the instant action, plaintiff has expanded his complaint to include eight causes of action.

His first cause of action alleges that the defendants violated his Fifth and Fourteenth Amendment rights to due process by terminating his employment without a pretermination hearing. In addition, he alleges the defendants violated his First Amendment rights by forcing him to stop publishing The Record a local newspaper.

(10) The second cause of action alleges the defendants violated his First Amendment rights by summarily terminating his employment for reasons that impermissibly abridged his constitutionally protected speech. See Plaintiff's Complain at paragraph 42. In this regard, he alleges the defendants terminated him because of his involvement with the publication of The Record. Furthermore, he asserts the defendants Bunker and Fandrich interfered with his First Amendment rights by attempting to prevent him from addressing the City Council to complain about an improper Ethics Board investigation of him. See id.

Plaintiffs third cause of action alleges that defendants violated his First, Fifth, and Fourteenth Amendment rights by publicly disclosing fallacious reasons for his termination, irreparably stigmatizing his reputation as a Licensed Professional Engineer, and foreclosing future employment opportunities and reducing and damaging his community standing. See Id. at paragraph 45.

Except for are the First Amendment allegations, the claims in these first three causes of action mirror the allegations which form the basis for plaintiff's complaint in the 1993 action. Thus, plaintiff is clearly barred from relitigating these (11) claims by the doctrine of res judicata. With respect to the First Amendment allegations, which he raises for the first time in this action, there is no question plaintiff could have raised these same allegations in the prior action. The events which form the basis for these allegations occurred prior to his termination and, according to plaintiff, were, at least in part, the reasons for said termination. For whatever reason, plaintiff chose not to raise any of these claims in the 1993 action. Although this was his choice, he now is bound by the consequences of that decision. Therefore, having failed to raise these claims which were available to him at the time of the 1993 action, he is barred by res judicata from raising them now.

Plaintiffs' fourth cause of action alleges the defendants, by summarily terminating his employment without affording him

notice and an opportunity to be heard, abolishing his position thus foreclosing potential reinstatement to a position for which he possesses a valid property interest, and falsely and intentionally and maliciously disseminating personally and professionally damaging reasons for his termination, engaged in extreme and outrageous conduct designed to intimidate, humiliate, and cause him severe emotional distress See id. at paragraph 49.

(12) Plaintiff's fifth cause of action alleges that defendants conspired to publicly defame his liberty interest in order to justify their illegal acts denying him due process and First Amendment rights by reprimanding him for his involvement with The Record in attempting to deny him access to address the City Council. See id. at paragraph 52. In this regard, plaintiff contends that he was fired from political reasons, that he was a member of a protected political affiliation group, and that defendants' actions violated sections 1983 and 1985. See id.

Plaintiff's sixth cause of action alleges the defendants violated Civil Service Law section 22 and local rules by not notifying him as required of the reclassification of his position, by removing job duties from him, and by giving those duties to others. See id. at paragraph 56.

Plaintiff's seventh cause of action alleges that defendants by failing to follow section 22 of the Civil Service Law "denied plaintiff his due process rights of section 75, by custom and his property interest and tenure rights of section 86 in his and due process rights of local civil service rule XXIII." See id. Id. at paragraph 58."

Finally, plaintiff's eighth cause of (13) action alleges the defendants denied him "his section 86 rights by acting in bad faith to abolish the position of City Engineer after improperly creating the positions of Director of City Streets, Director of Engineering Services, and Director of Municipal Utilities, and subsequently lying to a federal court stating that plaintiff still performed these duties which were improperly removed by

defendant." See Id. at paragraph 59. Moreover, plaintiff alleges that defendants acted in bad faith by falsely accusing him of incompetence in a letter and in newspaper articles. See id. at paragraph 60.

The allegations contained in plaintiff's fourth through eighth causes of action -- strike that -- the allegations contained in plaintiff's fourth through eighth causes of action are in many respects identical to those in his complaint in the 1993 action. Each purports to assert a violation of plaintiff's property interest in his position as City Engineer/Superintendent of Public Works or his liberty interest in his reputation. In the 1993 action, the court thoroughly addressed these issues including the applicability of section 75 to the plaintiff's position of City Engineer. As well as the independent officer exception to this statute. To the extent that these causes of action rely upon different (14) legal theories or different sources for these alleged liberty or property interest than those asserted in the 1993 action, they are barred by the doctrine of res judicata because plaintiff could have raised them in the prior litigation.

Despite the obvious similarities between the claims in the 1993 action and in the present one, plaintiff, nonetheless, argues that res judicata does not prevent him from relitigating these claims. In support of this action, he argues that there has never been a full and fair hearing on these claims and that the court never reached the merits in the 1993 action. In this regard, plaintiff asserts there was no discovery and no hearings in the 1993 action, that he was not appraised of the issue of "independent officer" by his former counsel, and that he did not see defendant Malone's affidavit, the accuracy of which he challenges, until three months after the court granted defendant's motion for summary judgment. In addition, plaintiff contends that he never received a copy of defendants' papers in the 1993 action. Finally, he asserts that defendants deliberately withheld information from the court which is uncontroverted evidence

that he had a right to a section 75 hearing prior to his termination. The court will discuss each of these arguments seriatim.

(15) First of all, plaintiff was represented by counsel in the 1993 action. Since he was so represented, defendants properly served their motion papers upon plaintiff's counsel rather than upon plaintiff himself. See Federal Rules of Civil Procedure 5(b) (whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court".

Moreover, whether or not plaintiff was appraised of the "independent officer" exception to section 75 coverage or shown Mr. Malone's affidavit by his former counsel, does not affect the application of res judicata to this action. This issue was fully briefed by defendants in their motion papers to which Mr. Malone's affidavit was attached. In addition, at oral argument on the cross-motion for summary judgment in the 1993 action, the court provided plaintiff's counsel with the opportunity to address the application of this exception to plaintiff's employment position. See O'Neill, 1993 U.S. District LEXIS 10958, at *21-*22. Only after hearing such argument did the court conclude that based upon the record before it plaintiff's position as City Engineer/Superintendent of Public Work was one to which the independent officer exception (16) applied. The fact that plaintiff may not agree with this conclusion does not render the doctrine of res judicata inapplicable.

Furthermore, plaintiff's argument that there was never a full and fair hearing on the issues and that the court's decision in the 1993 action was not on the merits is legally without merit. First of all, for res judicata purposes, a court's granting of a summary judgment motion is a final judgment on the merits. Western Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710 (Second Circuit 1977); 10 Wright, Miller & Kane, Federal Practice and Procedure, section 2712 (west 1993). Moreover, plaintiff

himself submitted an affidavit in support of his cross-motion for summary judgment and the court entertained oral argument on the cross motions. At that time, plaintiff's counsel had the opportunity to address any issues in support of or in opposition to the pending motions.

Finally, plaintiff's assertion that defendants deliberately withheld information from the court which would prove that he was entitled to a section 75 hearing prior to his termination is unfounded. The basis for this argument is the existence of a letter allegedly contained in plaintiff's personnel file regarding Ethic's Committee investigation. This letter (17) provides, in pertinent part, that with respect to the Ethics Board findings, plaintiff had a right to a hearing pursuant to section 75. See plaintiff's Exhibit C at 2. Plaintiff also alleges that despite numerous requests, defendants never provided him with a personnel file.

There are several problems with plaintiff's reliance upon this letter to defeat the application of res judicata. First of all, the request for plaintiff's personnel file were made subsequent to this court's decision in the 1993 action. See Plaintiff's Exhibit A (letters dated June 30, 1994, through September 14, 1994). There is nothing in the record to indicate that plaintiff, or his counsel, ever requested this file during the pendency of the 1993 action. In fact, defendants' attorney in his affidavit, affirmatively states that plaintiff did not service any discovery requests in that action. See D'Ambrosio Affidavit at paragraph 3. Nor did plaintiff object to defendants' summary judgment motion on the grounds that additional discovery was required. See id. Thus, defendants were under no obligation to turn over the file to plaintiff.

Although this letter may be some evidence that the City of Auburn had a custom of providing (18) employees such as plaintiff with a section 75 hearing, plaintiff previously raised the "custom" issue in his brief on appeal to the Second Circuit. See

D'Ambrosio Affidavit at paragraph 5 in Exhibit A attached thereto. Although the Second Circuit did not discuss this issue in its opinion, given its conclusion that plaintiff did not have a property interest in his employment, it is obvious that the court didn't adopt plaintiff's theory. Therefore, having raised this issue in the 1993 action, plaintiff is barred by the doctrine of res judicata from relitigating this issue in the present case.

In conclusion, having failed to assert any grounds which would defeat the application of res judicata to the present action, the court holds that plaintiff is barred by the final judgment in the 1993 action form litigating the claims contained in his complaint in the present action. Accordingly, the court grants defendants' motion for summary judgment. Having done so, the court must deny plaintiff's cross-motion for partial summary judgment as moot.

CONCLUSION

For the reasons stated above, the court (19) denies plaintiffs' motion to remand the action to state court. In addition, the court grants defendants' motion for summary judgment on the grounds that this action is barred by the doctrine of res judicata. Having determined that this action is barred by the doctrine of res judicata, the court need not address defendants' statute of limitations argument. Finally, the court denies plaintiff's cross-motion for summary judgment as moot. So ordered.

Now, the clerk will enter judgment accordingly. Mr. D'Ambrosio, I would like you to order a copy of this court's oral decision here from the court reporter and provide the plaintiff with a copy of it so he will have a opportunity to review it and also give the court a copy.

MR. D'AMBROSIO: Yes, your Honor, we will

The court: Thank you, gentlemen.

COURT CLERK: Court is adjourned.
(Whereon, the proceedings were concluded.)

* * *

(20) I, KENNETH H. CREWELL, JR., do hereby certify that I recorded stenographically the foregoing at the time and place mentioned and that the preceding is a true and correct transcript thereof to the best of my knowledge, ability and belief.

I further certify that I am not an attorney or counsel of any parties, not a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

s/Kenneth H. Crewell, Jr.
KENNETH H. CREWELL, JR.
Registered Professional Reporter

APPENDIX C—Second Circuit May 3, 1994 Order

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

GEORGE LANGE III
Clerk

DATE: May 3, 1994

Re: O'Neill v. City of Auburn

Docket No.(s): 93-7909

Dear Counsel:

The court has handed down a decision in the above-entitled case. The decision of the district court has been

AFFIRMED.

A copy of the printed opinion will be mailed to you. Additional copies of the opinion may be obtained from this office in accordance with Section 0.17(7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) of the Federal Rules of Appellate Procedure requiring the itemized and

verified bill of costs, if any, to be filed with proof of service, within 14 days after entry of judgment.

Very truly yours,

GEORGE LANGE III, Clerk
By:

s/Ralph A. Anderson
Ralph A. Anderson
Deputy Clerk

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s/opn/f
pc/opn/f

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

GEORGE LANGE III
Clerk

NOTICE

Local Rule effective July 1, 1992

0.40 Petitions for Rehearing

Each petition for rehearing shall include a copy of the opinion or summary order to which the petition relates.

If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding $250 against petitioner in favor of his adversary, to be collected with the costs in the case.

July 1, 1992

rehrg_frm

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1108 — August Term, 1993

(Argued: February 28, 1994 Decided: May 3, 1994)

Docket No. 93-7909

MICHAEL D. O'NEILL,

Plaintiff-Appellant,

v.

CITY OF AUBURN; GUY COSENTINO, Mayor of the City of Auburn; JAMES E. MALONE, City Manager for the City of Auburn; JAMES HUTCHINSON, ANN BUNKER, Councilors of the Auburn City Council; ANDREW V. LALONDE, as Corporation Counsel for the City of Auburn and OTHER UNKNOWN AND UNNAMED PARTICIPANTS IN THE COMPLAINED OF ACTS,

Defendants-Appellees.

Before: Kearse and Leval, Circuit Judges, and Pollack, Senior District Judge.*

Appeal from judgment entered in the United States District Court for the Northern District of New York (McCurn, J.) granting defendants' motion for summary judgment.

Affirmed.

EDWARD C. HOOKS, Ithaca, N.Y. (Laurie M. Johnston, Harris, Beach & Wilcox, Ithaca, N.Y., on the brief), for Plaintiff-Appellants.

NICHOLAS J. D'AMBROSIO, JR., Albany, N.Y. (Michael J. Grygiel, Bond, Schoeneck & King, Albany, N.Y., on the brief), for Defendants-Appellees.

LEVAL, Circuit Judge:

This is an appeal from a grant of summary judgment dismissing an action brought under 42 U.S.C. § 1983 by a terminated public official of Auburn, New York, alleging that his termina-

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*The Honorable Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

tion deprived him of property and liberty without due process of law. We affirm.

In September 1992, plaintiff-appellant Michael D. O'Neill was dismissed by the City of Auburn, New York, after nearly 15 years as City Engineer-Superintendent of Public Works. In recent years, O'Neill's service in that position had been marked by criticism in the press for alleged conflicts of interest, sometimes stemming from his private business interests; this criticism had included demands for his resignation. O'Neill also had been the subject of a grand jury investigation in 1988-89 and a City Ethics Board inquiry in 1990-91. The Auburn City Ethics Board had issued a report after investigation that O'Neill had violated the City Ethics Code (by receipt of a gift "under circumstances in which it could reasonably be inferred that the gift was intended to influence him . . . in the performance of his official duties . . . ."), and a grand jury had issued a report that O'Neill "may have created an appearance of impropriety."

Following his termination, O'Neill brought suit under 42 U.S.C. § 1983, claiming that defendants, The City of Auburn, the City Manager, and other city officials, deprived him of property and liberty interests without due process of law as guaranteed by the Fourteenth Amendment. First, O'Neill claims that Section 75 of New York State Civil Service Law gives him a property interest in his job, entitling him to notice and a hearing before termination; he received no notice or hearing. Second, he claims the defendants made stigmatizing public statements at the time he was terminated; he contends these statements infringed his constitutionally-protected liberty interest in securing future employment and entitle him to a hearing to clear his reputation.

The district court granted defendants' motion for summary judgment as to both claims.

I. Deprivation of property without due process

A. Property interest created by § 75

O'Neill claims deprivation of his property without due process because he was discharged from his position without notice and a hearing. When a governmental employee is found to have a "property interest" in continuation of his or her employment, the Due Process Clause of the Fourteenth Amendment forbids discharge unless the employee is afforded a pre-termination hearing. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972); Dwyer v. Regan, 777 F.2d 825, 831 (2d Cir. 1985), modified, 793 F.2d 457 (2d Cir. 1986). Property interests in employment "are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" Loudermill, 470 U.S. at 538 (quoting Roth, 408 U.S. at 577).

O'Neill identifies New York State Civil Service Law § 75(1)(c) as the source of his property interest in his job. This statute states in relevant part:

> A person . . . shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section [if that person is] an employee holding a position in the non-competitive class other than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy, who . . . has completed at least five years of continuous service . . . .

N.Y. Civ. Serv. Law § 75(1)(c) (McKinney Supp. 1993). O'Neill claims that his position is a non-competitive civil service title that was never classified as "confidential" or "policy-making" by the Auburn Civil Service Commission. It is undisputed that he held his position for "at least five years of continuous service." He therefore contends that § 75(1)(c) gives him a property interest in retaining his job unless termination is preceded by notice and hearing.[1] He asserts that his termination was not preceded by notice of charges of incompetency or misconduct and a hearing thereon, and that his right to due process before deprivation of his property was therefore violated.

We have previously held that § 75 gives covered employees a property interest in their employment, so that they may not be terminated without notice and hearing. Dwyer v. Regan, 777 F.2d 825 (2d Cir. 1985), modified, 793 F.2d 457 (2d Cir. 1986); Berns v. Civil Service Comm'n, 537 F.2d 714, 716 (2d Cir. 1976), cert. denied, 430 U.S. 930 (1977). Nonetheless, we reject O'Neill's claim because we find that the Auburn City Engineer-Superintendent of Public Works is an "independent officer" and is not covered by § 75.

B. Independent officer exception

While § 75(1)(c) expressly protects all civil service employees other than those in confidential or policy-making positions, defendants contend, and we agree, that the judicially-created independent officer exception exempts other positions from the protection of this statute.

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[1] O'Neill also claims that he had an "understanding" with the City of Auburn that independently created a property interest in the job. This argument, made apparently for the first time on appeal, is untimely, and in any event, appears to lack merit.

1. Definition of the exception

The independent officer exception to § 75(1)(c) originated in judicial interpretations of § 22 of the Civil Service Law (now § 75(1)(b)), a longstanding parallel provision, which gives military veterans and volunteer firefighters who held civil service positions the right to notice and a hearing before discharge. This section on its face excludes from its protection only those persons employed as "private secretary, cashier or deputy of any official or department." § 75(1)(b). However, in cases such as Mylod v. Graves, 274 N.Y. 381, 384, 9 N.E.2d 18 (1937) and O'Day v. Yeager, 308 N.Y. 580, 127 N.E.2d 585 (1955), the New York Court of Appeals has held that this section protects only subordinate employees, not those whose high level of responsibility qualifies them as independent officers. Id. at 585 ("The protection . . . . 'was intended to apply only to those holding positions of a subordinate nature,' and, consequently, to the list of persons specifically excluded from the protective coverage of the statute must be added those who are officials filling independent positions.") (quoting Mylod, 274 N.Y. at 384).

O'Neill grounds his assertion of a property interest in the more broadly applicable § 75(1)(c). He claims that the independent officer exception does not apply to § 75(1)(c) because this section sets forth an explicit exclusion that applies only to employees "designated . . . as confidential or requiring the performance of functions influencing policy." Id. The record supports O'Neill's contention that his position never received a designation as "confidential" or "policy-making." However, his argument that there is no independent officer exception to § 75(1)(c) has already been rejected by New York courts. We reject it as well.

In Nolan v. Tully, 52 A.D.2d 295, 383 N.Y.S.2d 655, 656 (3d Dep't 1976), the Appellate Division held that the "independent

officer" exception, which the courts had read into § 75(1)(b), applies equally to the protection against discharge given by § 75(1)(c). The court considered, but rejected, the possibility that the listing of confidential and policy-making positions in § 75(1)(c) precluded application of the independent officer exception. The court noted that when the Legislature added § 75(1)(c) in 1965, it was aware that the courts had created the independent officer exception to § 75(1)(b); "Nevertheless, there is a total absence of any language in the 1965 amendment to section 75 that could denude, or affect in any way this judicially created exception." Nolan, 383 N.Y.S.2d at 657. The court thus declined to rule that § 75(1)(c) granted tenured civil servants who came within the definition of independent officer any greater protection than that given veterans and volunteer firefighters by § 75(1)(b). It held attorneys employed by New York's department of taxation were independent officers and thus unprotected. The New York State Supreme Court for Erie County followed the authority of Nolan in Gallagher v. Griffin, 93 Misc. 2d 174, 402 N.Y.S.2d 516, 518 (Sup. Ct. Erie Co. 1978), holding the city's director for youth to be an "independent officer" and thus excluded from the protection of § 75(1)(c).

The Nolan and Gallagher decisions do not necessarily bind us, because while those holdings are grounded in the authority of the state's highest court, the Court of Appeals has not ruled on the precise issue whether the independent officer exception to § 75(1)(b) applies as well to § 75(1)(c). Our task is to predict how the state's highest court would rule on this issue. In re Brooklyn Navy Yard Asbestos Litig. (Joint E. & S. Dist. Asbestos Litig.), 971 F.2d 831, 850 (2d Cir. 1992) ("A federal court faced with a question of unsettled state law must do its best to guess how the state court of last resort would decide the issue."); cf. Plummer v. Lederle Lab., Div. of Am. Cyanamid Co., 819 F.2d 349, 355 (2d Cir.) (holding, in diversity action, that where state's highest court has not ruled on issue, federal court "should determine

what it believes that state's highest court would find if the issue were before it"), cert. denied, 484 U.S. 898 (1987); De Weerth v. Baldinger, 836 F.2d 103, 108 (2d Cir. 1987), cert. denied, 486 U.S. 1056 (1988).

We adopt the Third Department's ruling in Nolan as a reliable indicator of how the Court of Appeals would rule on the applicability of the independent officer exception to § 75(1)(c). See Brooklyn Navy Yard, 971 F.2d at 850 (noting that "[w]here the high court has not spoken, the best indicators of how it would decide are often the decisions of lower state courts"). The exemption of independent officers from civil service protection was long ago endorsed by the Court of Appeals. O'Day v. Yeager, 308 N.Y. 580, 127 N.E.2d 585 (1955); Mylod v. Graves, 274 N.Y. 381, 9 N.E.2d 18 (1937). O'Neill has not presented any authority to suggest that the independent officer exception has been repudiated or undermined. Furthermore, we find the reasoning of the Third Department in Nolan to be persuasive.

Accordingly, we find that Civil Service Law § 75(1)(c) does not confer a property right in continued employment upon state civil servants who are "independent officers" as that term is defined by New York case law. Cf. Baden v. Koch, 638 F.2d 486, 492 n.11 (2d Cir. 1980) (speculating that independent officer exception might apply to New York City's Chief Medical Examiner, who was found for other reasons not to be within the notice and hearing protection of § 75).

2. Application to appellant

We find for the reasons that follow that appellant O'Neill is an "independent officer."

The New York State Court of Appeals in 1955 defined "independent officer" as follows: "[H]e is an independent officer whose position is created, and whose powers and duties are

prescribed, by statute and who exercises a high degree of initiative and independent judgment." O'Day v. Yeager, 308 N.Y. 580, 586, 127 N.E.2d 585 (1955). O'Neill's position as City Engineer-Superintendent of Public Works is created by statute (Local Law 7 1963). The post's numerous statutory duties include giving permits for all street excavations, Auburn Munic. Code § 44.23, supervising restoration of streets, id. § 44.26, and directing the placement of underground wires and cables, id. § 44.37. The position grants considerable decisional authority over the water and sewer system, including the power to hold hearings to determine suspension of water service, id. at § 45.51(C), and to determine violations of sewage treatment requirements and assess penalties. Id. §§ 46.87-46.89. These duties require the exercise of a high degree of initiative and independent judgment. The fact that the City Engineer-Superintendent of Public Works receives direction from the City Manager does not preclude finding that he is an "independent officer." In O'Day v. Yeager, the Court of Appeals found that the clerk of the surrogate's court was an independent officer, even though his powers were exercised subject to the approval and direction of the surrogate. 308 N.Y. at 586.

In our opinion, the district court correctly determined that the City Engineer-Superintendent of Public Works is an independent officer who, under applicable state law, is excluded from the protection of Civil Service Law § 75(1)(c). O'Neill thus had no property interest in retaining this position, and defendants did not violate his right to due process of law by terminating him from the position without notice and a hearing. Defendants were properly granted summary judgment on O'Neill's first cause of action, and we affirm.

II. Deprivation of liberty without due process

Petitioner's second claim is that defendants stigmatized him by publicizing allegations impugning his professional competence and his ethics; he asserts entitlement under the Fourteenth Amendment to a name-clearing hearing.

Our courts have established that the "liberty" interest protected by the due process clause includes in certain circumstances the right to contest at a hearing public, stigmatizing governmental accusations that impose a substantial disability. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (holding that state law authorizing designated persons to prohibit alcohol sales to alleged problem drinkers by publicly posting their names violated due process clause because no notice or hearing was provided before posting). Because dismissal from employment for stigmatizing reasons can imperil the opportunity to earn one's living in one's profession, the liberty interest cause of action has most pointedly focussed on stigmatizing statements in the context of dismissal. See Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (establishing that liberty interest creates right to name-clearing hearing when government makes stigmatizing charges in connection with decision not to rehire employee, though finding that simple dismissal from non-tenured, one-year appointment not "stigmatizing," so no hearing required); Brandt v. Board of Coop. Educ. Servs., 820 F.2d 41, 43 (2d Cir. 1987) (liberty interest implicated when public governmental charges accompanying dismissal impose stigma that impairs opportunity to obtain other employment); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980) ("It is well-settled that an individual's liberty can be

implicated when a governmentally imposed stigma restricts his ability to seek and obtain employment.").[2]

The complaint asserts that at the time O'Neill was discharged from his position, local newspapers wrote that anonymous sources in city government told them that O'Neill was "incompetent," could "no longer do the job," had "poor relationships" with state agencies, did work that was not "up to par," and was "slopp[y]." The complaint attributes these statements to the defendants and alleges that they were false. In an affidavit filed in answer to defendants' motion for judgment on the pleadings, O'Neill added reference to press reports of similar assertions that "ethical considerations" led to his dismissal. The district court apparently treated this affidavit as an amendment of the complaint, broadening O'Neill's allegations to include the statements about "ethical considerations." The district court granted summary judgment in favor of the defendants on these claims. It held, first, that statements about competence are not "stigmatizing" and do not give rise to a cause of action for a name-clearing hearing. As to the alleged statement that O'Neill's dismissal was related to ethical considerations, the defendants

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[2]While Wisconsin v. Constantineau, 400 U.S. 433 (1971), suggested that the liberty interest might be implicated whenever the government imposed stigma, it is by now clear that simple damage to reputation does not give rise to a liberty interest claim; rather, the damage must be accompanied by some significant deprivation, such as dismissal from government employment. See Paul v. Davis, 424 U.S. 693, 708-712 (1976) (reading Constantineau to mean that liberty is infringed only when stigma is accompanied by deprivation of an interest protected by state or federal law, or by an alteration of legal status); Martz v. Incorporated Village of Valley Stream, slip op. at 3001, 3013 (2d Cir. Apr. 7, 1994) ("Defamation alone, even by a government entity, does not constitute a deprivation of a liberty interest protected by the Due Process Clause.").

had made a showing on the motion for summary judgment that this was true -- and O'Neill had failed to allege otherwise.

We affirm.

A. Allegations impugning competence

Not every derogatory statement made about an employee who loses his or her job imposes sufficient stigma to implicate the liberty interest and require a name-clearing hearing. Cf. Roth, 408 U.S. at 575 ("[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another"). In Russell v. Hodges, 470 F.2d 212 (2d Cir. 1972), we held that a provisional narcotics correction officer, discharged for sleeping on duty, being absent from his post without authorization, and wearing improper attire, had no right to a name-clearing hearing. Judge Friendly explained that stigmatization giving rise to a cause of action required "something considerably graver than a charge of failure to perform a particular job, lying within the employee's power to correct." Id. at 217 (emphasis added).

The district court granted summary judgment based on its understanding that allegations of incompetence are, as a matter of law, insufficiently stigmatizing to give rise to a cause of action. Although the district court may have read our precedents overbroadly, we nonetheless agree that, in this instance, the allegations going to O'Neill's competence did not implicate the liberty interest.

The last three statements reported by the newspapers about O'Neill -- that he had "poor relationships" with state agencies, that his work was not "up to par," and was "slopp[y]" -- fall clearly within the category of statements described in Russell that are not stigmatizing because they describe problems within the employee's power to correct.

As to the statements that O'Neill was fired for "incompetence" and that he could "no longer do the job," the question is somewhat closer. An accusation that a licensed professional is incompetent is "considerably graver" and carries more potential for future disqualification from employment than a statement that the individual performed a job poorly. An employee's unwillingness to perform professional duties properly in a particular position could result from innumerable factors that would not be replicated in a subsequent employment setting. A prospective subsequent employer, especially for a position requiring professional skills, is far more likely to hire one who has chosen to perform below par in a particular prior engagement than one who was incapable of doing the job.

We have held that governmental allegations of professional incompetence made in connection with an employee's termination may, if they significantly restrict future employment opportunities, sufficiently impair the liberty interest that a name-clearing hearing should be afforded. In Huntley v. Community School Board, 543 F.2d 979 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977), we held that public charges against a school principal that went "to the very heart of [his] professional competence," id. at 985, and that "might damage his professional reputation," id. at 986, "surely stigmatized [him] within the meaning of Board of Regents v. Roth." Id. at 985. See also Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 n.4 (2d Cir. 1980) (noting in dicta that "stigmatizing information is not limited to charges of illegality, dishonesty or immorality").

This does not mean that every time a professional employee is dismissed amid public charges of incompetence, a name-clearing hearing is required. In Baden v. Koch, 799 F.2d 825 (2d Cir. 1986), we denied a claim by New York City's former Chief Medical Examiner that his demotion to the position of Deputy Medical Examiner amidst critical public charges entitled him to

a name-clearing hearing. We noted that even after demotion Baden held a supervisory position and that "there is nothing in the record to show that Baden as an M.D. cannot obtain government or non-government employment using his skills in forensic medicine. . . . [H]e can still practice his profession." Id. at 830-31.[3] We contrasted Baden's situation with that of the school principal in Huntley, whose public castigation by school officials as a thoroughly incompetent principal made it "unlikely that [he] would ever have a chance to obtain another supervisory position -- in the public schools or elsewhere." Huntley, 543 F.2d at 985, cited in Baden, 799 F.2d at 830.

Taken together, our cases suggest that governmental allegations of professional incompetence, made in connection with an employee's termination, will not support a cause of action for a name-clearing hearing unless the allegations go "to the very heart of [the employee's] professional competence," Huntley, 543 F.2d at 985, and threaten to "damage his professional reputation," id. at 986, significantly impeding his ability to "practice his profession." Baden, 799 F.2d at 831.

We cannot find that the statements impugning O'Neill's "competence" stigmatized him in this manner. O'Neill's position as City Engineer/Superintendent of Public Works was multifaceted. It included not only duties he performed as a licensed professional civil engineer, but also numerous administrative and supervisory functions, as well as functions involving relations with other agencies of government. The statements published in the newspapers were vague and did not specify which aspects of his job he was "incompetent" to perform; they could have meant no more than that he lacked supervisory skills,

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[3]While we found that Baden had alleged a "weak" liberty interest, 799 F.2d at 831, we held that he was not entitled to a name-clearing hearing, in part because he had already been given the opportunity to publicly contest the accuracy of the allegedly stigmatizing allegations.

had an abrasive managerial style, or caused unnecessary friction in dealing with other public agencies. Thus we cannot find that these statements impugned his professional reputation as a licensed engineer or impaired his ability to find future employment within his profession. Without passing here on whether or in what circumstances publicized statements of government officials to the effect, "O'Neill is an incompetent engineer," might have implicated his liberty interests, we can safely conclude that the vague statements of unspecified "incompetence" did not damage O'Neill's professional reputation in a manner that required a hearing. Accordingly, we find that the district court was correct in granting summary judgment as to these statements.

B. Allegations about "ethical concerns"

The district court also granted the defendants' motion for summary judgment on the other portion of O'Neill's liberty interest claim, in which O'Neill contended that his liberty interest was violated by statements by unnamed government officials that "ethical considerations" played a part in his termination. The court found that, while statements impugning ethics were stigmatizing under Board of Regents v. Roth, 408 U.S. 564, 573 (1972) and Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980), summary judgment was appropriate because O'Neill had failed to allege that these statements were untrue.

As noted above, the complaint initially referred only to the statements alleging incompetence. Defendants then moved for judgment on the pleadings, arguing on the theory that because statements about incompetence are not stigmatizing, O'Neill stated no liberty interest claim. O'Neill responded by an affidavit (which all apparently treated as an amendment of the complaint)

in which he asserted that the defendants also made statements to the effect that "ethical considerations" contributed to his firing.

The defendants then moved for summary judgment, pointing out that O'Neill had failed to allege the falsity of the complained-of statement about ethical considerations and that furthermore, the statement, if made, was undeniably true, as (i) the Auburn City Ethics Board had issued a report after investigation that O'Neill had violated the City Ethics Code (by receipt of a gift "under circumstances in which it could reasonably be inferred that the gift was intended to influence him . . . in the performance of his official duties . . . ."), and (ii) a grand jury had issued a report that O'Neill "may have created an appearance of impropriety." O'Neill made no response.

The court ruled that this required grant of the defendants' motion for summary judgment. We agree with that ruling.

A plaintiff who demands a name-clearing hearing must contest the truth of the allegedly stigmatizing statements because, as the Supreme Court has explained, the purpose of a name clearing hearing is to give the allegedly stigmatized employee an opportunity to refute the government's stigmatizing charges. If the truth of the statements is not contested, there is nothing to have a hearing about. Codd v. Velger, 429 U.S. 624, 627 (1977) ("[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation.").

In addition to plaintiff's failure to plead (or otherwise allege) the falsity of the proposition that ethical considerations played a role in his dismissal, he also failed to submit any evidence showing the existence of a triable issue of fact in response to the defendants' showing, on their summary judgment motion, that this proposition was true. The court therefore asserted, "Nor does it appear that plaintiff could allege that these statements are

false," (Op. at 35 n.10), citing the defendants' evidence of the grand jury and Ethics Board reports. Although a plaintiff is not required in such an action to prove the falsity of the stigmatizing statements, that being the function of the eventual name-clearing hearing, Brandt v. Board of Coop. Educ. Servs., 820 F.2d 41, 43-44 (2d Cir. 1987), if the defendants have shown on their motion for summary judgment that the stigmatizing statements are true, the plaintiff must at least show that there is a factual dispute. See Fed. R. Civ. P. 56(e). O'Neill's failure to rebut defendants' showing that ethical considerations played a part in his dismissal therefore provides additional reason, beyond his failure to plead falsity, for the dismissal of this portion of his action.[4]

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[4]Although not briefed by the parties, this case raises the additional question whether the action is mooted by the availability to the plaintiff of a libel action in the courts of New York. If, by offering such an action, the State of New York has provided O'Neill with the very remedy he seeks -- a "name clearing hearing" consonant with the requirements of due process -- then there is no need for an action under 42 U.S.C. § 1983. In this respect, this case seems distinguishable from those precedents where the stigmatizing statements were made as part of the governmental agency's official act of terminating the employee. In such cases, the officials making the stigmatizing statements would be immune from suit. See, e.g., Barr v. Matteo, 360 U.S. 564 (1959) (establishing absolute immunity from defamation suits for federal officials acting within scope of duty); Sheridan v. Crisona, 14 N.Y.2d 108, 249 N.Y.S.2d 161 (1964) (holding state law extends absolute immunity from defamation suits to state and local executive officials acting within scope of duty). The official immunity of the defendants would thus deprive the stigmatized employee of an opportunity to clear his name by suing for libel, giving rise to his need for an action under 42 U.S.C. § 1983. Here, on the other hand, where it is alleged that officials of city government anonymously provided unofficial statements to reporters that were then disseminated, such

(continued...)

Conclusion

The district court's grant of summary judgment, dismissing O'Neill's claims that the City of Auburn deprived him of property and liberty interests in connection with his termination from employment as City Engineer/Superintendent of Public Works, is affirmed.

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[4](...continued)
statements might not be a part of the performance of official duties, and the officials might therefore be subject to suit. Cf. Hutchinson v. Proxmire, 443 U.S. 111 (1979) (holding that although Speech and Debate Clause, U.S. Const. art. 1, § 6, gave senator immunity from libel suit for speech on Senate floor, immunity did not extend to repetition of speech in press releases and newsletters). State law might thus offer plaintiff the remedy he seeks. (Where a libel plaintiff seeks no damages, but only a name-clearing declaratory judgment, I have argued that the obligation imposed by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to prove "malice" does not arise, as Sullivan imposes that prerequisite only on the award of money damages to protect the press from intimidation. Pierre N. Leval, The No Money No Fault Libel Suit: Keeping Sullivan in Its Proper Place, 101 Harv. L. Rev. 1287 (1988)).

Judges Kearse and Pollack express no views either in agreement or disagreement with the discussion in this footnote.

APPENDIX D—Northern District August 2 1993 Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHAEL D. O'NEILL,

Plaintiff,

-v.- No. 93-CV-100

THE CITY OF AUBURN, GUY COSENTINO, Mayor of the City of Auburn, JAMES E. MALONE, City Manager for the City of Auburn, JAMES HUTCHINSON, ANN BUNKER, Councilors of the Auburn City Council; ANDREW V. LALONDE, As Corporation Counsel for the City of Auburn, and OTHER UNKNOWN AND UNNAMED PARTICIPANTS IN THE COMPLAINED OF ACTS,

Defendants.

APPEARANCES: OF COUNSEL:

HARRIS BEACH & WILCOX EDWARD C. HOOKS, ESQ.
Attorneys for Plaintiff
121 East Seneca Street
P.O. Box 580
Ithaca, New York 14850

BOND, SCHOENECK & KING NICHOLAS J.
Attorneys for Defendants D'AMBROSIO, JR., ESQ.
111 Washington Avenue
Albany, New York 12210-2280

NEAL P. McCURN, S.J.

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

Plaintiff Michael D. O'Neill ("O'Neill") commenced this action pursuant to 42 U.S.C. § 1983 against defendants City of Auburn ("City"); Guy Cosentino, Mayor of the City; James E. Malone, City Manager; James Hutchinson and Ann Bunker, Councilors of the City Council; Andrew V. LaLonde, Corporation Counsel for (2) the City; and "Other Unknown and Unnamed Participants in the Complained of Acts." In his complaint, O'Neill alleges that these defendants deprived him of liberty and property interests protected by the Fifth and Fourteenth Amendments to the United States Constitution. For these alleged deprivations, O'Neill seeks, among other things, compensatory and punitive damages as well as reinstatement to his former position or a noncompetitive class civil service position requiring similar engineering skills and offering similar compensation. See Plaintiff's Complaint at "WHEREFORE" clause.

Presently before the court are defendants' motion for summary judgment with respect to plaintiff's second cause of action, plaintiff's cross-motion for partial summary judgment as to his first cause of action, and defendants' cross-motion for summary judgment with respect to plaintiff's first cause of action. Originally, defendants moved for partial judgment on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, dismissing plaintiff's second cause of action on the ground that it failed to state a claim upon which relief could be granted or, in the alternative, dismissal of the second cause of action as against the individual defendants on the ground that they are protected by the doctrine of qualified immunity. In addition, defendants sought dismissal of both of plaintiff's causes of action against defendants Cosentino, Hutchinson and Bunker on the ground that they are immune from suit under the doctrine of absolute legislative immunity.

(3) Plaintiff submitted papers in opposition to this motion and also cross-moved for partial summary judgment on his first cause of action with respect to the issue of liability. Due to the fact that plaintiff's opposition papers referred to matters outside the pleadings, defendants sought permission from the court to convert their Rule 12(c) motion to one for summary judgment. See D'Ambrosio Letter dated May 21, 1993. They also sought direction from the court as to the correct procedure for filing a cross-motion to plaintiff's cross-motion for partial summary judgment on plaintiff's first cause of action. By letter dated May 25, 1993, the court informed the parties that, at the request of defendants, it would convert defendants' Rule 12(c) motion to one for summary judgment. The court also informed the parties that it would treat defendants' cross-motion to plaintiff's cross-motion as a "reply" and that as such defendants were to file and serve their papers in support of their cross-motion no later than June 15, 1993.

The court entertained oral argument on these motions on July 27, 1993, and reserved decision. The following constitutes the court's findings of fact and conclusions of law with respect to these motions.

BACKGROUND

In May 1977, the City hired O'Neill as a Senior Civil Engineer. See O'Neill Affidavit at ¶ 5. Thereafter, in April 1978, he became City Engineer/Superintendent of Public Works; a position he held until his allegedly illegal termination by (4) Auburn City Manager, James E. Malone, on September 18, 1992. See id. On July 3, 1992, O'Neill received a confidential memo from Malone asking him to resign no later than September 13, 1992. See id. at ¶ 8 and Exhibit E. In response, O'Neill notified Malone, by letter dated September 16, 1992, that he had no intention of resigning. See id. at ¶ 8 and Exhibit F. Thereafter, by letter dated September 17, 1992, Malone informed

O'Neill that he was terminating O'Neill's employment as of 5:00 p.m., Friday, September 18, 1992. See id. at ¶ 9 and Exhibit G. In this letter, he further informed O'Neill that he intended to ask the City Council to abolish the position held by O'Neill at its next scheduled meeting. See id. It is this termination that forms the basis for this suit.

O'Neill's complaint consists of two causes of action. In his first cause of action, O'Neill maintains that he "[h]as a valid property interest in his employment as the City Engineer/Superintendent of Public Works for the City of Auburn." See Plaintiff's Complaint at ¶ 30. In this regard, O'Neill alleges that

> [t]he actions of Defendants, and each of them, violated the Fifth and Fourteenth Amendment [sic] to the United States Constitution, and 42 U.S.C. § 1983, in that by acting in concert and failing and refusing to afford Plaintiff with notice and a hearing in accordance with New York Civil Service Law § 75, before terminating his employment, they have deprived Plaintiff of property without due process of law.
>
> The actions of Defendants, and each of them, further violated the Fifth and Fourteenth Amendment [sic] to the United States Constitution, and 42 U.S.C. § 1983, in (5) that by acting in concert and abolishing the position of City Engineer/Superintendent of Public Works in bad faith, they have deprived Plaintiff of reinstatement to the position he formerly occupied, for which he possesses a valid and protectable property interest and did thereby further act to deprive Plaintiff of his rights under New York City Service Law § 75.

See id. at ¶¶ 31, 32.

As a result of these alleged actions on the part of defendants, O'Neill contends that he "[h]as been deprived of his employment as the City Engineer for the City of Auburn since September 18, 1992, and has suffered mental anguish and emotional distress and a loss of income and benefits as well as diminished reputation in the community and diminished opportunity to pursue his chosen career." See id. at ¶ 33.

In his second cause of action, O'Neill alleges that

> [t]he actions of Defendants, and each of them, violated the Fifth and Fourteenth Amendment [sic] to the United States Constitution, and 42 U.S.C. § 1983, in that by publicly disclosing fallacious reasons for termination of Plaintiff's employment Defendants irreparably stigmatized Plaintiff's reputation as a licensed professional engineer and foreclosed future employment opportunities.
>
> These public disclosures, stemming from Plaintiff's unlawful termination and the abolition of the position of City Engineer/Superintendent of Public Works, were in derogation of Plaintiff's liberty interest guaranteed by the Fifth and Fourteenth Amendment [sic] to the Constitution of the United States subject to redress under 42 U.S.C. § 1983.

See id. at ¶¶ 35, 36.

As a result of these actions, O'Neill contends that he

(6) suffered great mental anguish, from then until now, and he will continue to so suffer in the future; and he has lost and will in the future lose great sums of money by reason of his discharge from employment and having been greatly humiliated and held up to

public scorn, ridicule and derision as a result of the foregoing acts of the Defendants.

See id. at ¶ 37.

Plaintiff's complaint contains three paragraphs that refer to certain allegedly fallacious and defamatory statements. In general terms, he alleges that "[t]he newspaper reports of Plaintiff's termination contained statements from unidentified sources from the City of Auburn that are false and defamatory and that affect Plaintiff's good name, reputation, honor and integrity." See Plaintiff's Complaint at ¶ 22 (emphasis added). In the next two paragraphs of his complaint, plaintiff specifically refers to statements contained in two newspaper articles published within a short time after his termination. First, plaintiff states that "[o]n September 18, 1992, the Auburn, New York newspaper, The Citizen, stated that 'according to sources at City Hall' O'Neill was fired for 'incompetence' and that O'Neill could 'no longer do the job.' " See id. at ¶ 23 (emphasis added). Finally, plaintiff asserts that "[o]n September 19, 1992, a Syracuse, New York newspaper, The Post-Standard, reported that City of Auburn officials, who asked to remain anonymous, said that O'Neill's work was not 'up to par,' that he had 'poor relationships' with state agencies, and that there was 'sloppiness' in O'Neill's work on recent projects." See id. at ¶ 24 (emphasis added).

(7) There is no dispute that these articles did, in fact, appear in local newspapers See O'Neill Affidavit, Exhibits H, I.[1] In the first of these articles, published on September 18, 1992, The

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[1]In addition to these two articles, plaintiff attached a third article to his affidavit in opposition to defendants' motion. See O'Neill Affidavit, Exhibit J. This article, which appeared in The Citizen on September 20, 1992, simply discussed, in somewhat greater detail, the "confluence of factors" that allegedly resulted in plaintiff's discharge.

Citizen reported that "City Engineer Michael O'Neill was fired this morning for incompetence, according to sources at City Hall." See id., Exhibit H (emphasis added). The article went on to state that

> O'Neill had also angered and embarrassed city councilors this summer when his private business sold tens of thousands of dollars worth of dirt to Paul Vitale—a contractor who had enjoyed more than $100,000 in city contracts through O'Neill's office.
>
> O'Neill failed to obtain the proper permits to mine dirt from his property in Cato. That a city official so intimately familiar with state environmental regulations would fail to follow state law was unforgivable, the source said.
>
> O'Neill's long-time attempts to establish a composting facility in Cato angered City Hall because the operation would compete directly with the city's new waste disposal plans. Mostly, though, Malone fired him for failing to do his job well. "Malone feels he can no longer do the job," a source said. "The manager does not feel he has done the job he was hired to do -- that he is incompetent."

See id. (emphasis added).

On September 19, 1992, a similar article discussing O'Neill's termination appeared in The Post Standard. This article reported that (8)

> [s]ome elected officials said the decision to force O'Neill to resign had been in the works for weeks. O'Neill's work was not up to par, he did not cooperate

> with Malone and he had poor relationships with state agencies, said the officials, who asked to remain anonymous.
>
> Ethical considerations about the engineer, who owns several private businesses and was censured by the city's ethics board last year, were factors in the decision but didn't tip the scales, the officials said.

See id. at Exhibit I (emphasis added).

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The mere existence of some alleged factual dispute, however, will not defeat such a motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202, ___ (1986). Rather Rule 56 requires that there be no genuine issue of material fact. Id. at 2488, 106 S. Ct. at 2510, 91 L.Ed.2d at ___ (emphasis in original). Material facts are defined as those that might affect the outcome of the suit under the governing law. Id.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of any genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2558, 91 L.Ed.2d 265, ___ (9) (1986). Once the moving party has met this burden, the burden shifts to the non-movant to demonstrate that there is a genuine issue of material fact. In this regard, the non-movant must do

more "than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538, ___ (1986). "Speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact. To avoid summary judgment, enough evidence must favor the non-moving party's case such that a jury could return a verdict in its favor." Greenblatt v. Prescription Plan Servs. Corp., 783 F. Supp. 814, 819-20 (S.D.N.Y. 1992) (citing Anderson, 477 U.S. at 248 (interpreting the "genuineness" requirement)).

Moreover, as a preliminary matter, the non-movant must "[m]ake a showing sufficient to establish the existence of [the] element[s] essential to [his] case, and on which [he] will bear the burden of proof at trial." Celotex, at 322, 106 S. Ct. at 2552, 91 L.Ed.2d at ___. If the non-movant fails to satisfy this initial burden, there can be no genuine issue as to any material fact because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Id. at 322, 106 S. Ct. at 2552, 91 L.Ed.2d at ___. Under such circumstances, the moving party is entitled to judgment as a matter of law. Id. at 323, 106 S. Ct. at 2552, 91 L.Ed.2d at ___.

(10) Furthermore, for purposes of determining whether or not to grant summary judgment, the language of Rule 56 limits the information that the court may consider to the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file. In this regard, a movant's uncontested assertions in its 10(j) statement are deemed admitted for purposes of deciding whether summary judgment should be granted. See Local Rule 10(j); see also Blackwelder v. Safnauer, 689 F. Supp. 112-13 n.2 (N.D.N.Y. 1988), appeal dismissed, 866 F.2d 548 (2d Cir. 1989). In contrast, as one court in this circuit has stated

> [i]t is now well-settled that legal memoranda and oral argument are not evidence and "cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists." British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 ([9th Cir.] 1978) [, cert. denied, 440 U.S. 981, 99 S. Ct. 1790, 60 L.Ed.2d 241 (1979)]; see also Transurface Carriers, Inc. v. Ford Motor Co., 738 F.2d 42, 46 (1st Cir. 1984); Watt v. United States, 703 F.2d 346, 353 (9th Cir. 1983).

United States v. United States Currency in Amount of $23,481.00, 740 F. Supp. 950, 955 (E.D.N.Y. 1990).
It is with these guidelines in mind that the court must analyze the facts of this case to determine whether or not the parties are entitled to the relief they seek.

II. Plaintiff's First Cause of Action—"Constitutionally Protected Property Interest"

"[A] property interest in a particular position arises only when an individual possesses 'a legitimate claim of entitlement' to continued job tenure. Such entitlements are not created by (11) the Constitution, but rather by independent sources such as state law." Tranello v. Frey, 758 F. Supp. 841, 852 (W.D.N.Y. 1991), aff'd, 962 F.2d 244 (2d Cir. 1992) (quoting Hawkins v. Steingut, 829 F.2d 317, 321 (2d Cir. 1987) (citations omitted)); see also Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548, ___ (1972). If a plaintiff possesses such a legitimate claim of entitlement to his position, the State may not deprive him of that position without due process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 105 S. Ct. 1487, 1491, 84 L.Ed.2d 494, ___ (1985) (citations omitted).

In the present case, plaintiff contends that New York Civil Service Law § 75(1)(b) and (c) provides him with a property interest in his employment as City Engineer/Superintendent of Public Works. This statute provides, in pertinent part:

> 1. Removal and other disciplinary action. A person described in . . . paragraph (b), or paragraph (c), . . . of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section. . .
>
> (b) a person holding a position by . . . employment in the classified service of the state or in the several cities, counties, towns or villages thereof, or in any other political or civil division of the state or of a municipality, . . . who was honorably discharged . . . from the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, . . . except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or
>
> (c) an employee holding a position in the non-competitive class other than a position (12) designated in the rules of the state of municipal civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, . . .

N.Y. Civ. Serv. Law § 75 (McKinney 1983 & 1992 Supp.) (emphasis added).

In support of his argument that § 75 provides him with a constitutionally protected property interest in his job, plaintiff asserts that he meets both of the requirements for coverage under § 75(1)(b); i.e., his job title is part of the City's classified service and he served in the United States Army in time of war and was honorably discharged from such service. See Plaintiff's Memorandum of Law at 9. Furthermore, he avers that he is covered by § 75(1)(c) because he held a position in the non-competitive class for more than five continuous years and this position was not designated as either confidential or requiring the performance of functions influencing policy. See id. at 10.

Defendants concede that "[t]he position of City Engineer/Superintendent of Public Works is classified as a non-competitive class civil service position by the Auburn Municipal Civil Service Commission." See Plaintiff's 10(j) Statement at ¶ 5; see also Defendants' 10(j) Statement at ¶ 1. They also concede that "[a]t the time Plaintiff's employment was terminated, he had served approximately fourteen years and five (13) months in the position of City Engineer/Superintendent of Public Works." See Plaintiff's 10(j) Statement at ¶ 11; see also Defendants' 10(j) Statement at ¶ 1. Finally, defendants admit that "[n]either the New York State Department of Civil Service nor the Auburn Municipal Civil Service Commission formally reclassified the position of City Engineer/Superintendent of Public Works as 'confidential or requiring the performance of functions influencing policy,' . . ." See Defendants' 10(j) Statement at ¶ 2. Despite their agreement with these facts, however, defendants argue that plaintiff does not fall within the ambit of either section 75(1)(b) or (c) because he is an "independent officer" -- a judicially-created exception to the protection afforded certain employees under § 75 of New York Civil

Service Law. See Defendants' Reply Memorandum of Law at 11-12.

The independent officer exception to § 75's protection is not a new one. In fact, the New York courts originally created this exception with reference to § 75's predecessor statute (N.Y. Civ. Serv. Law § 22).[2] In Matter of Mylod v. Graves, 274 N.Y. 381, 9 N.E.2d 18 (1937), the petitioner was a World War veteran who claimed the preference given by section 22 to veterans. He (14) had been appointed Tax Appraiser for Dutchess County on April 5, 1923. On July 17, 1935, he was removed from that position without a hearing because the Tax Commissioner claimed he was an official and not an employee and thus was not within the provisions of section 22. On appeal, the petitioner argued that after the Court of Appeals' decision in Fornara v. Schroeder, 261 N.Y. 363, 185 N.E. 498 (1933), all veterans in any position were entitled to section 22's protection except "[t]he position of private secretary, cashier or deputy of any official or department." See Mylod, 274 N.Y. at 383, 9 N.E.2d at 18. The court disagreed, holding that "[a]ll that the Fornara case decided was that subordinate employees were entitled to the protection as veterans even although put in the exempt class. Positions in the exempt class are included in the protection afforded by section 22 of the Civil Service Law." Mylod, 274 N.Y. at 383, 9 N.E.2d at 18.

The court went on to note that another exception had been applied to officials holding independent positions and not

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[2]Moreover, courts have held that this exception is applicable to subdivision (1)(c) of § 75 as well as subdivision (1)(b). See Matter of Nolan v. Tully, 52 A.D.2d 295, ___, 383 N.Y.S.2d 655, 657 (3d Dep't 1976). The basis for this conclusion is that "[i]t is clear that the sole basis of the development and implementation of the judicial exception was the nature and relative independence or subordination of the position and its incumbent." Nolan, 52 A.D.2d at ___, 383 N.Y.S.2d at 657.

subordinate employees. In this regard, the court stated that "[s]ection 22 of the Civil Service Law was intended to apply only to those holding positions of a subordinate nature, . . ." Mylod, 274 N.Y. at 384, 9 N.E.2d at 18. Citing People ex rel. Jacobus v. Van Wyck, 157 N.Y. 495, 506, 52 N.E. 559, ___ (1899), the court stated that " '[t]he test by which to determine whether they [officials] are subordinates is not whether a review of such of their determinations as are quasi-judicial may be had, but (15) whether, in the performance of their various duties, they are subject to the direction and control of a superior officer, or are independent officers, subject only to such directions as the statute gives. If the latter, then the officer is not a subordinate as the term is used in the decisions bearing upon this subject.' " Mylod, 274 N.Y. at 384, 9 N.E.2d at 18-19. Based upon this distinction between an independent officer and a subordinate employee, the court concluded that the Tax Appraiser was an independent officer and therefore his removal without a hearing on the charges was proper. Mylod, 274 N.Y. at 387, 9 N.E.2d at 20.

This judicially-created independent officer exception to New York Civil Service Law § 22 and its successor, § 75, is well-established in New York jurisprudence.[3] Thus, consistent with

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[3]See, e.g., Application of Ause v. Regan, 59 A.D.2d 317, ___, 399 N.Y.S.2d 526, 531 n.6 (4th Dep't 1977) (stating that "[a]rguably, the broad powers conferred upon the Superintendent of E.J. Meyer Memorial Hospital . . . establish that as a matter of law the office of superintendent is an independent position exempt from the hearing requirements of Civil Service Law, § 75."); Matter of Nolan v. Tully, 52 A.D.2d 295, ___, 383 N.Y.S.2d 655, 656 (3d Dep't 1976) ("The courts have held consistently that the protection of section 75 (subd. [1], par. [b]) was intended to apply only to those veterans holding positions of a subordinate nature, and consequently, to the list of persons specifically excluded from the protective coverage of the

(continued...)

(16) this caselaw, even if plaintiff meets all the enumorated requirements of subdivision 1(b) and 1(c) of § 75, he will not be afforded the protections of this section if he is determined to be an independent officer. Since there is no dispute that plaintiff meets the statutorily enumerated criteria, the only issue before the court is whether or not plaintiff, in his capacity as City Engineer/Superintendent of Public Works, is an independent officer and thus outside the scope of § 75's protection.[4] In his memorandum of law, plaintiff never discusses the applicability of the "independent officer" exception to the facts of this case. At oral argument, however, in response to the court's question regarding the applicability of this exception, plaintiff's counsel responded that § 75(c), as amended in July 1988, makes clear that in order for a person to be excepted from § 75's protection, his position must be specifically "[d]esignated in the rules of the state or municipal civil service commission as confidential or

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[3](...continued)
statute must be added those who are officials filling independent positions, who may be characterized as independent officers . . ."); Matter of Easterly v. Boehlert, unpublished opinion (Sup. Ct. Onondaga County, Aug. 14, 1986) (Zoning Enforcement Officer was independent position and thus petitioner was not protected by § 75 which applies only to those holding subordinate positions); Application of Gallagher v. Griffin, 93 Misc.2d 174, 402 N.Y.S.2d 516 (Sup. Ct. Erie County 1978) (Director of the Youth Board and Deputy Commissioner of the Department of Human Resources of City of Buffalo was an independent officer and thus not protected by the provisions of § 75).

[4]Although defendants suggest, in passing, that plaintiff may be a deputy and that his position requires the performance of functions influencing policy (two enumerated exceptions to § 75's coverage), their argument in support of their motion for summary judgment rests primarily upon their contention that plaintiff is an independent officer.

requiring the performance of functions influencing policy, . . ." N.Y. Civ. Serv. Law § 75(c) (McKinney 1983 & 1992 Suppl). Since his position was not so designated, argues plaintiff, he is not excepted from § 75's protection.

(17) The court disagrees with plaintiff's interpretation of the effect of this amendment. A review of the "Historical and Statutory Notes" to § 75(c) reveals that the only effect that this amendment had on subsection (c) was to "[d]elete[] 'in the state service' following 'An employee', insert[] 'or municipal', and delete[] 'state' following 'last entry into'." Id., Historical and Statutory Notes. In short, the only substantive change to result from this amendment was the addition of municipal workers to the category of those protected by § 75(c). There is no indication, however, that the State Legislature intended this amendment to affect the continued viability of the long-standing judicially-created independent officer exception to this section's protection. Accordingly, the court concludes that if defendants are able to demonstrate to the court's satisfaction that, as a matter of law, plaintiff's position is that of an independent officer, defendants will be entitled to summary judgment with respect to plaintiff's first cause of action.

A person who is an independent officer is one "[w]hose position is created, and whose powers and duties are prescribed by statute, and who exercises a high degree of initiative and independent judgment." Nolan, 52 A.D.2d at ___, 383 N.Y.S.2d at 656 (citing Matter of O'Day v. Yeager, 308 N.Y. 580, 586, 127 N.E.2d 585, 586 [(1955)]). Moreover, it is "[t]he duties of the position, not its name, [that] determine the status of the position." Nolan, 52 A.D.2d at ___, 383 N.Y.S.2d at 657.

(18) In the present case, the position of City Engineer/Superintendent of Public Works was created in 1963 by local law. See Defendants' Exhibit G. The many duties of this position were most recently enumerated in the 1991 Code of the City ("Code") and in the job specifications approved by the

City's Civil Service Commission. See Defendants' Exhibit I. The general parameters of this position are set forth in the job specifications under the heading of "Distinguishing Features of the Class" which reads as follows:

> [t]his is an important administrative position involving responsibility for planning, initiating and directing the activities of the Public Works Department and supervising the work of the City Engineering Department. The City Engineer serves as a consultant to all city officials and departments on the engineering aspects of city projects. Direction is received from the City Manager with extensive leeway for the exercise of independent judgment in planning the details of projects and assuring responsibility for technical results.

See Defendants' Exhibit I (emphasis added).

More specifically, the Code provides that the City Engineer/Superintendent of Public Works is responsible for, among other things,

> 1. the examination and licensing of drainlayers (§ 18.4);
> 2. oversight of the restoration of streets and sidewalks after removal of building materials (§ 44.2(D); § 44.26);
> 3. approval of applications for building permits (§ 44.23);
> 4. cancellation, rescission and alteration of any excavation permit and direction as to how such work shall be conducted (§ 44.24(C));
> 5. authorization of the installation of utility wires and poles (§ 44.31);
> 6. authorizing access to the public sewer system (§ 46.11, .64, .65), approval of any deviation from industry standards in effluent levels (§ 46.19), approval of private

(19)

sewage disposal systems (§ 46.60), approval of discharge levels above authorized limits for certain types of effluents (§ 46.60);

7. determining whether more stringent conditions than Federal or State requirements are necessary for regulating discharges into the public sewers (§ 46.74);

8. exercising broad powers to determine if sewer discharges are deleterious and to reject such waste, require pre-treatment, regulate the quantity of discharge, or take other measures to protect the sewer system (§ 46.37);

9. determining whether a monitoring system should be installed by a user of the sewers; or requiring a treatment plan for a user for substances that interfere with the sewers (§ 46.54, .72, .73);

10. requiring the installation of a separate water system (§ 45.44);

11. directing the relaying of streets after excavation (§ 44.26);

12. determining what type of containers are required for the storage of hazardous waste (§ 72.48);

13. determining the installation of traffic lights (§ 60.3)

14. directing the owner of underground wiring subways to provide suitable outlets and facilities and to make alterations and repairs (§ 44.37);

15. conducting hearings and determining whether to order the termination of water service for violation of the Code or for non-payment (§ 45.51); and

16. initiating investigations and holding hearings of conditions affecting the sewers, settling claims, revoking, suspending or altering a user's permit, and issuing emergency abatement orders without hearings (§ 46.87-.89, .93).

See Defendants' Exhibit H.

In addition to the duties enumerated in the Code, O'Neill testified on April 29, 1993, in a proceeding in New York State (20) Supreme Court, Cayuga County, entitled Walsh v. Malone, that he "[d]id almost everything in the City, with the exception of police and fire-type work." See Defendants' Exhibit K at 67. He further testified that he was "[c]hairman of the Auburn City Planning Board for approximately ten years [and that he] acted in the capacity of Acting City Manager in the absence of the City Manager." See id. Finally, in his affidavit in support of defendants' cross-motion for summary judgment, City Manager James Malone sets forth numerous other functions that O'Neill performed involving construction projects, intergovernmental relationships, outside consultants, roads, infrastructure maintenance and municipal parking. See Malone Affidavit at ¶¶ 17-32.

Many of these functions are similar to those that the petitioner performed in Easterly. In that case, the petitioner, a veteran and volunteer fireman, was the Zoning Enforcement Officer for the Town of Salina. After his employment was terminated without a pretermination hearing, petitioner commenced an Article 78 proceeding seeking a judgment directing the respondents to reinstate him on the ground that his removal violated § 75(1)(b). See Easterly at 1-2. To the contrary, the respondents argued, among other things, that petitioner was not protected by § 75 because he was an independent officer. See Easterly at 2. Since there was no dispute concerning the petitioner's duties, the only issue before the court was the proper application of the law to these undisputed facts. In this regard, the court noted that "[t]he protection of section 75 of (21) the Civil Service Law applies only to those holding subordinate positions and not to those holding independent positions (see, Matter of Mylod v. Graves, 274 NY 381, 387 [1937]). 'Whether a civil service position is independent or subordinate depends on the nature of the duties, their prescription by statute, and whether a "high degree of initiative and independent judgment" is required [citations

omitted]' (Matter of Elterman v. Parisi, 7 A.D.2d 771 [3d Dept, 1958] holding that a Workers' Compensation Claims Referee was an independent officer)." Easterly at 4 (emphasis added).

With these guidelines in mind, the court went on to discuss whether the petitioner's position was that of an independent officer. By way of illustration, the court focused its attention on the following examples of the petitioner's duties:

> Interprets the zoning ordinance and issues building permits and certificates of occupancy for buildings which comply with the ordinance;
> Issues trailer permits and makes monthly statements to the census bureau;
> Inspects property from the standpoint of safety and condemns property where required;
> Enforces compliance with the zoning ordinances in respect to abandoned farm equipment or junk cars;
> Explains and interprets the requirements of the municipal zoning law to contractors and the general public;
> Investigates complaints of violations;
> Makes reports to the local legislative body on inspections made and permits issued.

Easterly, at 5-6.

Based upon the nature of these activities, the court found that "[t]he primary duties of the Zoning Enforcement Officer are thus (22) in keeping with those of an independent officer." Id. at 6. Furthermore, the court concluded that the petitioner exercised a number of quasi-judicial functions including the issuing of building permits and certificates of occupancy after determining that the building complied with the zoning ordinances. Id. Moreover, the court found that, according to the job specifications, the petitioner performed these functions under the general direction of the Town Board and not under the direct supervi-

sion of another official. Id. (citation omitted). Finally, the court determined that the fact that some of the petitioner's duties might be ministerial did not affect the status of the position as an independent one. Id. Based upon all of these factors, the court concluded that petitioner's position was that of an independent officer. Accordingly, the court held that he was neither entitled to the protection of § 75 nor was he entitled to continued employment in that position. Id.

In the present case, O'Neill's duties, as enumerated in the Code and the job specifications, are even more extensive than those exercised by the petitioner in Easterly. Likewise, his duties exceed those of individuals whom other courts have found to be independent officers.[5] See, e.g., cases cited in footnote (23) 3 supra. Thus, based upon the undisputed facts with respect to O'Neill's duties and the applicable caselaw, the court concludes that O'Neill is an independent officer and, therefore, is not entitled to the protection of § 75. Consequently, § 75 does not provide plaintiff with a constitutionally protected property interest in continued employment as City Engineer/Superintendent of Public Works. There, plaintiff cannot maintain a cause of action based upon a claim that his termination from his position without a hearing deprived him of a constitutionally protected property interest in his employment.

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[5]At oral argument, plaintiff's counsel asserted that, even assuming that plaintiff had at one time been an independent officer, by the time his employment was terminated he had been stripped of some of his duties. Thus, counsel argued that having stripped plaintiff of some of his responsibilities, the City no longer could assert that plaintiff was an independent officer. The court disagrees. Although it may be true, as plaintiff alleges, that the City had stripped him of some of his duties at the time of his termination, the fact remains that he still performed a sufficient number of functions to support a finding that he was an independent officer.

Accordingly, the court grants defendants' cross-motion for summary judgment as to plaintiff's first cause of action.

III. Plaintiff's Second Cause of Action - "Constitutionally Protected Liberty Interest"

Defendants base their summary judgment motion with respect to plaintiff's claim that he was deprived of a constitutionally protected liberty interest in his reputation on two grounds. First, as to those published statements concerning plaintiff's job performance, defendants assert that plaintiff has failed to establish that these statements are "stigmatizing." Secondly, with respect to the statements concerning "ethical considerations," defendants contend that plaintiff has failed to (24) demonstrate that these statements were created by defendants or, in the alternative, that even if they were, these statements are false. To the contrary, plaintiff asserts that "[t]he newspaper articles coinciding with his firing have irreparably damaged his good name and standing in the community, as well as his professional reputation as a licensed engineer." See Plaintiff's Memorandum of Law (citing Plaintiff's Complaint ¶¶ 22, 35).[6]

In his complaint, plaintiff specifically refers only to those statements in the September 18th and 19th newspaper articles that may be characterized as "job related;" i.e., "incompetence," "no longer do the job," "work not up to par," "poor relationships with state agencies," and "sloppiness on recent projects." See Plaintiff's Complaint at ¶¶ 23, 24. Attached to his affidavit in opposition to defendants' motion, however, is a copy of the

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[6]In the two paragraphs of the complaint that plaintiff cites, he alleges that the statements in the newspaper articles are "defamatory and false," "affect his good name, reputation, honor and integrity," and "irreparably stigmatized his reputation as a licensed professional engineer and foreclosed future employment opportunities." See Plaintiff's Complaint at ¶¶ 22, 35.

entire article that appeared in The Post Standard on September 19, 1992. This article, in addition to the statements referred to in plaintiff's complaint, contains references to "ethical considerations" as one reason for plaintiff's termination.

In his memorandum of law, plaintiff's discussion focuses upon those statements that relate to ethical considerations (25) rather than those that concern his job performance. For example, plaintiff refers to statements made by

> [a]nonymous sources at Auburn City Hall [that] publicly and falsely accused Mr. O'Neill of dishonest and unethical conduct in carrying-out his responsibilities as City Engineer/Superintendent of Public Works, as well as professional incompetence as an engineer, . . .; [f]alse accusations that a civil servant, such as Mr. O'Neill, has breached the public trust by using his public office for private gain are certainly "stigmatizing", and call into question his good name and personal integrity.

See Plaintiff's Memorandum of Law at 16-17 (emphasis added) (citing Board of Regents v. Roth, [408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)]; Hogue v. Clinton, 791 F.2d 1338 (8th Cir.), cert. denied, 479 U.S. 1008, 107 S. Ct. 648, 93 L.Ed.2d 704 (1968); Doe v. United States Dep't of Justice, 753 F.2d 1092 (D.C. Cir. 1985)).

Based upon his review of the applicable law, plaintiff concludes that "[a]ccordingly, when termination is accompanied by accusations of dishonesty, illegal or immoral conduct the plaintiff has been stigmatized and must be provided with a name clearing hearing." See Plaintiff's Memorandum of Law at 16 (emphasis added) (citing Roth, 408 U.S. at 573, 92 S. Ct. at 2707; Brandt v. Board of Coop Educ. Servs., 820 F.2d 41 (2d Cir. 1987); Brito v. Diamond, 796 F. Supp. 754 (S.D.N.Y. 1992)).

In this circuit,

> [a] government employee's liberty interest is implicated where the government dismisses him based on charges "that might seriously damage his standing and associations in his community" or that might impose "on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."

Brandt, 820 F.2d at 43 (quoting Roth, 408 U.S. at 573, 92 S. Ct. at 2707, 33 L.Ed.2d at ___).

To be "stigmatizing," "[t]he information relied upon to support the discharge must 'call into question the plaintiff's "good name, reputation, honor or integrity".'" McCarthy v. Cortland County Community Action Program, Inc., 487 F. Supp. 333, 344 (N.D.N.Y. 1980) (Munson, J.) (quoting Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980) (quoting in turn Roth, 408 U.S. at 573, 92 S. Ct. at 2707)). For example, in Brandt, the Second Circuit stated that "[c]harges that the employee is guilty of dishonesty or immorality are stigmatizing . . ." Brandt, 820 F.2d at 43 (quoting Roth, 408 U.S. at 573, 92 S. Ct. at 2707). On the other hand, the Second Circuit has explained that "[w]e believe the [Supreme] Court was thinking of something considerably graver than a charge of failure to perform a particular job, lying within the employee's power to correct; . . ." Russell v. Hodges, 470 F.2d 212, 217 (2d Cir. 1972).

Although the focus of plaintiff's opposition to defendants' motion rests primarily upon the statements concerning "ethical considerations," his counsel asserted at oral argument that, under the circumstances of this case, the job-related comments defendants allegedly made at or near the time of plaintiff's dismissal are also stigmatizing. In support of this argument, plaintiff relies solely upon the Second Circuit's decision in Huntley v. Community Sch. Bd., 543 F.2d 979 (2d Cir. 1976), cert. denied, 430 U.S. 929, 97 S. Ct. 1547, 51 L.Ed.2d 773

(1977). In that case, the plaintiff was discharged from his position as (27) acting school principal. A letter that the Superintendent had written detailing the charges against the plaintiff, all job-related, was read aloud to an audience of more than 300 people at a public Board of Education meeting. The plaintiff was not given the opportunity either to respond to the public reading of these charges or to challenge them by calling witnesses in his behalf. Under these circumstances, the court concluded that "[h]aving discharged [the plaintiff] with a public statement of these charges, it is unlikely that [the plaintiff] would ever have a chance to obtain another supervisory position -- in the public schools or elsewhere." Huntley, 543 F.2d at 985. The court held, therefore, that these charges "[w]hich were publicly read . . . surely stigmatized [the plaintiff] within the meaning of Board of Regents v. Roth. . . ." Id.

Plaintiff is correct in his assertion that Huntley remains good law in this circuit. The court notes, however, that Russell likewise remains good law in this circuit. As stated above, the court in Russell held that more than a job-related charge was required to maintain a cause of action based upon a deprivation of a liberty interest. Thus, faced with what would appear to be conflicting holdings by the Second Circuit, this court is left to choose between the two. Having carefully reviewed both of these cases as well as more recent caselaw in this circuit, the court finds itself in agreement with the District Court for the Southern District of New York that "Russell and its progeny must be regarded as providing the governing law. . . . Therefore plaintiff must show that he was dismissed amid allegations of dishonesty, illegal or immoral conduct in order to be stigmatized enough to be unconstitutionally deprived of liberty." Brito, 796 F. Supp. at 757-58 (emphasis added).[7] Accordingly, the court

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[7]Although not bound by decisions of other circuits, the court reviewed recent decisions by courts in those circuits that had faced this issue. These (continued...)

concludes that plaintiff cannot rely upon such job-related statements to support his claim that he has been deprived of a constitutionally protected liberty interest. On the other hand, those statements that refer to "ethical considerations" can properly be classified as stigmatizing. Thus, with respect to these latter statements, if plaintiff can demonstrate the existence of the other elements necessary to maintain a claim (29) that he has been deprived of a constitutionally protected liberty interest, he will be able to withstand defendants' motion for summary judgment on his second cause of action.

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[7](...continued)
cases overwhelmingly support the court's conclusion that job-related statements are not stigmatizing for purposes of implicating a constitutionally protected liberty interest. See, e.g., Portman v. County of Santa Clara, No. 91-16743, 1993 U.S. App. LEXIS 13397, *25-26 (9th Cir., June 9, 1993) ("'Charges that carry the stigma of moral turpitude' such as dishonesty or immorality 'may implicate a liberty interest, but charges of incompetence or inability to get along with others do not'" (quoting Wheaton v. Webb-Petett, 931 F.2d 613, 617 (9th Cir. 1991))); Prichard v. Lafferty, No. 91-5257, 1992 U.S. App. LEXIS 20759, *19 (6th Cir., Aug. 25, 1992) ("[L]iberty interests are not implicated by allegations of improper or inadequate performance, or in some cases by charges of incompetence, neglect of duty or malfeasance." (citing Chilingiriau v. Boris, 882 F.2d 200, 205-06 n.8 (6th Cir. 1989))); Hyland v. Wonder, 972 F.2d 1129, 1142 (9th Cir. 1992) (statement that plaintiff could not work as a peace officer in California, press statement revealing circumstances of plaintiff's discharge and allegation that plaintiff improperly accessed confidential files held to be insufficiently egregious to activate the protections of the Due Process clause); Potter v. Cannady, No. C-92-1076-DLJ, 1993 U.S. Dist. LEXIS 4637, *25 (N.D. Cal. Apr. 5, 1993) ("Only the 'stigma of dishonesty or moral turpitude gives rise to a liberty interest; charges of incompetence do not.'" (quoting FDIC v. Henderson, 940 F.2d 465, 477 (9th Cir. 1987) (citing in turn Roley v. Pierce County Fire Protection Dist., 869 F.2d 491, 495 (9th Cir. 1989)))).

Unfortunately for plaintiff, he has failed to meet this burden. First of all, despite his statements to the contrary, plaintiff has failed to allege that those statements that refer to "ethical considerations" are false. In his memorandum of law, plaintiff directs the court's attention to paragraphs 22 and 35 of his complaint to support his argument that he has alleged the falsity of these statements. A careful reading of plaintiff's complaint in its entirety, however, belies such an argument. Although these paragraphs contain assertions that the published statements are "false and defamatory" and "disclosed fallacious reasons for plaintiff's termination," see Plaintiff's Complaint at ¶¶ 22, 35, the only possible statements to which these assertions can relate are those contained in paragraphs 23 and 24. Paragraphs 23 and 24, however, consist entirely of statements concerning plaintiff's job performance. Having determined that such statements are not stigmatizing, it is irrelevant whether they are false. Such a finding would not change the fact that such statements cannot serve as a basis for plaintiff's claim that defendants deprived him of a constitutionally protected liberty interest in his reputation.

The only time that plaintiff mentions the statements in the September 19, 1992, newspaper article that refer to "ethical considerations" is in his affidavit in opposition to defendants'

(30) motion.[8] In paragraph 12 of this affidavit, plaintiff asserts that

> [t]he next day, September 19, 1992, The Post Standard newspaper reported that "ethical considerations" were a factor leading to my dismissal. These "ethical considerations" amount to accusations that I used my position as a public servant for my own private gain. Specifically, the article mentions alleged conflicts of interest between my public employment and private engineering business, and violations of the city's ethics code. The source of these charges, according to the article, was City Councilors who asked to remain anonymous.

See O'Neill Affidavit at ¶ 12.
There is no assertion in this or any other paragraph of plaintiff's affidavit, however, that these statements are false.

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[8]It was plaintiff's reference to these very statements that prompted defendants to request that the court convert their motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, to one for summary judgment. Had the court not granted defendants' request and entertained their motion as it was originally noticed, there is no doubt that defendants would have prevailed because the statements to which plaintiff specifically referred in paragraphs 23 and 24 of his complaint are not stigmatizing and thus could not have sustained his Fourteenth Amendment liberty interest claim.

Prior to converting this motion to one for summary judgment, the court, as it is required to do, notified all parties of its intention. Having received such notice, the parties are bound by the appropriate legal standards pertaining to such a motion. In this regard, to withstand defendants' motion for summary judgment, plaintiff must demonstrate that a genuine issue of material fact exists and, in addition, must demonstrate the existence of each element of his cause of action upon which he will bear the burden of proof at trial.

Although courts have held that a plaintiff need not prove that the published stigmatizing statements are false, he must, at least, allege that they are false. See Brandt, 820 F.2d at 43 (citing Codd v. Velger, 429 U.S. 624, 627, 97 S. Ct. 882, 883, 51 L.Ed.2d 92 (1977)). In Brandt, the issue before the court was "[w]hether the district court properly granted summary judgment to appellees based on its ruling that Brandt must prove that appellees had actually disclosed false allegations of sexual misconduct." Brandt, 820 F.2d at 43. Before deciding this ultimate issue, the court stated that, "[a]s a preliminary matter, it is not clear whether the district court ruled that Brandt had to prove the falsity of the charges in order to establish his right to a name-clearing hearing or only in order to establish damages." Id. The court went on to state that although it had no problem with the latter proposition, it had no doubt that the former proposition was erroneous. Id. In this regard, the court said that "[t]he Supreme Court has required only that a plaintiff raise the issue of falsity regarding the stigmatizing charges -- not prove it -- in order to establish a right to a name-clearing hearing. Id. (citing Codd, 429 U.S. at 627, 97 S. Ct. at 883). The rationale for this conclusion is quite simple -- if the plaintiff were required to prove the falsity of the statements before he was entitled to a hearing, there would be no need for such a hearing. Id. at 43-44.

For purposes of the present motion, it is instructive to look beyond Brandt to the Supreme Court's decision in Codd upon which the Brandt court extensively relied. In Codd, plaintiff's original complaint alleged that he had been wrongly dismissed without a hearing or a statement of reasons from his position as a patrolman with the New York City Police Department. See Codd, 429 U.S. at 624, 97 S.Ct. at 882. After the district court determined that Codd, as a probationary officer, had no hearing right based upon a property interest in his job, Codd filed an amended complaint. See id. In this amended complaint, Codd asserted that he was entitled to a hearing because of the stigmatizing effect of certain material in his personnel file. Specifi-

cally, he alleged that the derogatory material had caused his subsequent dismissal for a position with the Penn-Central Railroad Police Department and that it had prevented him from finding other employment of a similar nature. See id. at 625, 97 S. Ct. at 883. After a bench trial, the court held against Codd on all issues based upon its conclusion that Codd had not proved that he had been stigmatized by defendants.[9] See id.

Codd successfully appealed that district court's decision to the Second Circuit. That court held that the finding of no stigma was clearly erroneous. See id. In this regard, the court

> [r]easoned that the information about the apparent suicide attempt was of a kind which would necessarily impair employment prospects for one seeking work as a police officer. It also decided that the more act of making available personnel files with the employee's consent was enough to place responsibility for the stigma on the employer, since former employees had no practical alternative but to consent to the release of such information if they wished to be seriously considered for other employment.

Id. (citing Velger v. Cawley, 525 F.2d 334 ([2d Cir.] 1975)).

The Supreme Court granted certiorari. The parties urged the Court to consider "[w]hether the report in question was of a

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[9]An officer of the Penn-Central Railroad Police Department was shown the City Police Department file relating to Codd's employment. From examining this file, the officer "[g]leaned that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt." Codd, 429 U.S. at 626, 97 S. Ct. at 883. The officer tried to verify this story, but the Police Department refused to cooperate with him. See id. The court also found that plaintiff had failed to establish "[t]hat information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers." Id.

stigmatizing nature, and whether the circumstances of its apparent dissemination were such as to fall within the language of Board of Regents v. Roth, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) and Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976)." Id. The Court, however, "[found] it unnecessary to reach these issues, . . ., because of [Codd's] failure to allege or prove one essential element of his case." Id.

The element that the Court found Codd had failed to allege or prove was the very same element that is at issue in this case -- the falsity of the allegedly stigmatizing statements. In this regard, the Court stated that

> [i]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. Nowhere in his pleadings or elsewhere has [Codd] affirmatively asserted that the report of the apparent suicide attempt was substantially false. . . . [W]e believe the absence of any such allegation . . . is fatal to [Codd's] claim under the Due Process Clause that he should have been given a hearing.

Id. at 627, 97 S. Ct. at 884 (emphasis added).

(34) This Court went on to explain that

> [t]he hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely "to provide the person an opportunity to clear his name." If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him. . . . Only if the employer creates and disseminates a false and defamatory impression about the

> employee in connection with his termination is a hearing required.

Id. at 627-28, 97 S. Ct. at 884 (emphasis added) (citing Roth and Bishop).

Finally, the Court concluded that

> [e]ven conceding that [Codd's] termination occurred solely because of the report of an apparent suicide attempt, . . . [Codd] has at no stage of this litigation affirmatively stated that the "attempt"did not take place as reported. . . . [Codd] has therefore made out no claim under the Fourteenth Amendment that he was harmed by the denial of a hearing, even were we to accept in its entirety the determination by the Court of Appeals that the creation and disclosure of the file report otherwise amounted to stigmatization within the meaning of Board of Regents v. Roth, supra.

Id. at 628-29, 97 S. Ct. at 884-85 (emphasis added).

In the present case, O'Neill finds himself in the same position as Codd. Even conceding that the statements concerning "ethical considerations" are stigmatizing or that the inferences that reasonably could be drawn from these statements are stigmatizing, nowhere in his affidavit has O'Neill alleged that (35) these particular statements are false.[10] Having failed to allege this essential element of his claim that he was deprived of a constitutionally protected liberty interest without due process, O'Neill

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[10]Nor does it appear that plaintiff could allege that these statements are false. First, the grand jury's investigation and report were widely publicized. See D'Ambrosio Affidavit, Exhibit A. Second, the findings of the Auburn City Ethics Committee clearly state that Mr. O'Neill violated two sections of the City's Code of Ethics when he accepted a gift from a surveyor working on a development in the City. See D'Ambrosio Affidavit, Exhibit B.

cannot withstand defendants' summary judgment motion. See Celotex at 322, 106 S. Ct. at 2552, 91 L.Ed.2d at ___. Accordingly, the court grants defendants' motion for summary judgment as to plaintiff's second cause of action pursuant to Federal Rule of Civil Procedure 56.

CONCLUSION

For the reasons stated above, plaintiff has failed to demonstrate that defendants deprived him of either a constitutionally protected property or liberty interest without due process. Accordingly, the court grants defendants' motion for summary judgment with respect to plaintiff's second cause of action and grants defendants' cross-motion for summary judgment with respect to plaintiff's first cause of action. Having granted these motions, the court must deny plaintiff's cross-motion in its entirety. In this regard, the clerk is instructed to enter judgment granting defendants summary judgment in their favor and against plaintiff with respect to plaintiff's complaint in its entirety.

IT IS SO ORDERED.

DATED: August 2, 1993
Syracuse, New York

s/Neal P. McCurn
NEAL P. McCURN
SENIOR, U.S. DISTRICT JUDGE

APPENDIX E—September 18, 1991 letter granting right to a hearing

(Seal)

CITY OF AUBURN
Memorial City Hall
AUBURN, NY 13021
Phone (315) 255-4146
Fax: 315-253-3243

September 18, 1991

Mr. Michael O'Neill
City Engineer
Memorial City Hall
Auburn, New York 13201

Dear Mr. O'Neill:

We have reviewed the Auburn City Ethics Board report dated August 27, 1991, as it relates to possible violations of the Auburn City Ethics Code.

The report indicates that you violated Chapter 4, Article 1, Section 4.7 (1) (a) and (c) of the Code, which states: (a) No municipal officer or employee shall directly or indirectly solicit any gift, or accept or receive any gift having a value of $75.00 or more", and (c) "receive or enter into any agreement, expressed or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer." In effect the Board determined that a $4,000.00 check from Wheeling to Olszewski constituted a gift to you as President and owner of American Group One.

We have also reviewed your comments directed towards the Ethics report and after taking into consideration the Ethics report and your comments, and the information now available, we have come to the following conclusions:

1. There are unresolved questions concerning an alleged agreement with Wheeling.

2. There are unresolved questions concerning the actual date Olszewski was hired by American Group One.

3. The Ethics report fails to state that Olszewski allegedly collected unemployment benefits at the same time he claimed he was working for American Group One.

4. The report's final conclusions are based on circumstantial evidence.

5. There is a lack of direct evidence.

6. The present Code is antiquated and ambiguous.

7. Your failure to cooperate with the Board by not responding to a written request for information and by not attending a Board meeting despite being asked by the City Manager.

As a result and although there is only circumstantial evidence to support the acceptance of a gift, there appears to be a certain degree of impropriety involved in your relationship with Wheeling. Your position as City Engineer, representing the City of Auburn, should be beyond reproach. As indicated in the report, you may have exercised poor judgment in dealing with Wheeling. Also your relations with the Ethics Board should have been more cooperative. Consequently you are hereby issued this disciplinary letter of reprimand and advised that you exercise caution and better judgment in the future when dealing with outside contractors as they relate to work being done within the City of Auburn.

Please be advised that pursuant to Section 75 of the Civil Service Law, you have eight (8) days within which to respond to this letter in writing. If you do not respond, this letter will be the final determination and will by law become public record.

Please be further advised that pursuant to Section 75 of the Civil Service Law, you have the further right to a hearing in this matter.

Very truly yours,

s/Joseph H. Braun
Joseph H. Braun
City Manager

s/Michael Oropallo
Michael Oropallo
Asst. City Manager

/jns
cc: Michael McKeon, Corporation Counsel

APPENDIX F—Corporation Counsel Thurstons stating O'Neill had right to hearing

. . . Thurston said O'Neill's job is protected by Civil Service, and that O'Neill would be entitled to a hearing before he could be dismissed.

APPENDIX G.—Plaintiff Not Given Hearing

. . . Superintendent of Public Works as "confidential or requiring the performance of functions influencing policy," but note that the New York State Department of Civil Service informed the Auburn Municipal Service Commission by letter dated May 2, 1989 that the plaintiff could be "an 'independent officer' . . . not protected by the provisions of section 75 of the Civil Service Law." Malone aff. ¶ "9"; Def. Ex. "J".

3. In response to paragraph "12", defendants admit that plaintiff was not served with formal charges pursuant to section 75 of the Civil Service Law, but aver that plaintiff was informed verbally and in writing on more than one occasion of the grounds for the dissatisfaction with the plaintiff's conduct and job performance. Malone aff. ¶¶ "33"-"34"; Def. Exs. "W", "X".

4. In response to paragraph "13", defendants admit that plaintiff was not given a pretermination hearing, but further state that plaintiff had several meetings with City Manager Malone at which plaintiff had the opportunity to defend his conduct and performance. Malone aff. ¶ "34".

5. Admit the statements in paragraphs "15", "16", and "19", but state that Corporation Counsel Andrew V. LaLonde responded to each letter from the plaintiff's attorneys and invited them to demonstrate plaintiff's alleged entitlement to a hearing under section 75.

6. Admit that the September 23, 1992 letter from plaintiff's attorneys was received by the City of Auburn and . . .

APPENDIX H.—Incomplete Report Statement

. . . The City has been unable to locate a complete copy of the report. Page 9 is missing.) . . .

APPENDIX I.—Discovery Postponement

. . . and because counsel for all parties agreed that defendants' original motion for partial judgment on the pleadings might help clarify the scope of the action and determine the issues on which discovery would be necessary.

In light of defendants' outstanding discovery requests, the plaintiff should not be entitled to summary judgment on the first claim. Discovery could assist the defendants in establishing their independent officer defense, their defense that the position was abolished for purposes of . . .

APPENDIX J.—Mayor's Affidavit Granting Right to a Hearing

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHAEL O'NEILL,

Plaintiff,

vs.

AFFIDAVIT
CIV. ACTION NO.;
95-CV-1492
HONORABLE JUDGE
NEAL P. McCURN

CITY OF AUBURN, GUY COSENTINO, Mayor of the City of Auburn, JAMES E. MALONE, City Manager for the City of Auburn, JAMES HUTCHINSON, ANN BUNKER, Councilors of the Auburn City Council, ANDREW LALONDE, As Corporation Counsel for the City of Auburn, and OHTER UNKNOWN AND UNNAMED PARTICIPANTS IN THE COMPLAINED OF ACTS,

Defendants.

TO; Patrick L. Seely, Jr.
Nicholas J. D'Ambrosio, Jr.
Defendants Counsel
Bond, Schoeneck & King
111 Washington Avenue
Albany, New York 12210-2280

State of New York)
) ss.:
County of Cayuga)

I, Edward L. Lauckern, Jr., being duly sworn, deposes and says that:

1) I was the Mayor of the City of Auburn for eight (8) years from 1984-1991.
2) I was a City of Auburn City Councilor for ten (10) years prior to being elected Mayor.
3) Before, after and during my administration it was the policy, practice and custom of the City of Auburn to give its City Engineer's Civil Service Section 75 protection (a hearing) and as I publicly stated the position of City Engineer/Superintendant of Public Works held by Mr. Michael O'Neill was entitled to the same hearing prior to any disciplinary action or discharge based on the practices of the City of Auburn. I did inform Mr. O'Neill that he was entitled to a hearing under section 75 of the Civil Service Law of New York State, the same as City Engineer George Govern and City Engineer David Dunning who, as City of Auburn City Engineers each received hearings pursuant to section 75.

Dated April 8, 1996

s/Edward L. Lauckern, Jr.
Edward L. Lauckern, Jr., Mayor (retired)
56 West Street
Auburn, New York 13021

KRISTEN R. SALVAGE
Notary Public, State of New York
Qualified in Cayuga Co.
Official No. (illegible)
Commission Expires (illegible)
s/Kristen R. Salvage